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the Federal Communications Commission of
the United States

VOLUME 103 (2d Series)
Pages 527 to 898

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—Horizon B/cing. Inc.
MM Docket No. 84-762

Antenna, Height of
(See: Antenna Change-*Horizon B/cing. Inc.*)

Appeal, Denied
Review Board denied appeal from ALJ's order which, though approving a settlement agreement and merger, conditioned grant of the application upon initiation of service within one year. Because MDS rules, 47 CFR Sec. 21.43, specifies an 8-month construction period, and parties have not stated a basis for anticipating an inability to comply, the ALJ's condition was immaterial and harmless.
—Digital Paging Systems, Inc.
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—Taft TV and Radio Co. Inc.

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Review Board affirms *ID* grant to comparative Public Coast Radio applicant who was preferred because of his superior facilities and services, more experienced personnel, more definite rates and practices, and better interconnection plan.
—Murray Cohen
PR Docket No. 84-1312

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Review Board denied appeal from ALJ's order which, though approving a settlement agreement and merger, conditioned grant of the application upon initiation of service within one year. Because MDS rules, 47 CFR Sec. 21.43, specifies an 8-month construction period, and parties have not stated a basis for anticipating an inability to comply, the ALJ's condition was immaterial and harmless.

—Digital Paging Systems, Inc.
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Depreciation Rates

This Order will prescribe depreciation rates and amortization amounts for the telephone companies and accounts/subaccounts shown in the Appendix to the Order.

—So. Bell Tel. & Tel. Co.

Discovery

Review Board remands proceeding and adds a misrepresentation/candor issue to determine the effect on an applicant's basic and comparative qualifications of its failure to disclose an employment agreement potentially inconsistent with its integration proposal in response to a discovery request. ALJ also asked to review the refusal to accept an engineering amendment in view of the fact additional hearings will be necessary in any case.

—Lee Optical & Assn. Co.
MM Docket No. 83-1338

Diversification

(See also: Broadcast Record Past, See also: Programming or Comparative—*Knoxville B/cing Co.*)

Diversification See Also Ownership

In hearing matter of seven mutually exclusive CP applications for new FM station, Review Board reversed ALJ's grant based on a Section 307(b) preference. Board held that Section 307(b) was not dispositive and went on to award the grant to the applicant selected by the ALJ as the best comparative applicant. Board declined to add a transmitter site availability issue against applicants proposing site on land owned by the Bureau of Land Management.

—Arizona Number One Radio, Inc.
MM Docket No. 84-245

Divestiture

Petition for reconsideration of *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*. 100 FCC 2d 1244, which found telephone company constructed cable television facilities in violation of Section 214(a) of Communications Act and Section 63.54 of cross-ownership rules, denied. Ordered divestiture of cable systems reaffirmed and forfeiture imposed.

—CCI Cablevision

Divestment of Interests
(See Divesture—*CCI Cablevision*)

Facility, Modification
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First Local Transmission-Unbuilt Facility, Dual License

Review Board reverses *I. D.* in part, crediting (and granting) Troy, Ohio applicant, to modify unbuilt facility that would not be built unless its sought frequency change were granted as proposing a first local transmission service under Sec. 307(b). Aff'd crediting of station dually licensed to Columbus-Worthington, Ohio as existing local outlet for Worthington, thus eliminating Worthington applicant from Sec. 307(b) consideration and permitting affirmance of grant of Point Pleasant, W. Va. applicant because no longer mutually exclusive. Programming evidence of outlet's alleged failure to serve Worthington properly excluded because no issue and no threshold showing.

—Land O'Lakes B/cing Corp. WTRJ(AM)
MM Docket No. 84-481

Forfeiture

Commission upholds imposition of monetary forfeitures against vessel's owner and master for violation of listening watch requirement of Section 83.202(c) of Rules. Facts clearly establish that watch was not maintained. Failure to maintain continuous watch is not justified by "need" to turn down radio while addressing passengers over public address system.

—Harry D. Parsons

Forfeiture Mitigation, Request for Denied
(See: Divestiture—*CCI Cablevision*)

Frequency Equitable Distribution of Under 307(b)
(See: Diversification See Also Ownership—*Arizona Number One Radio, Inc.*)

(See also: Broadcast Record Past, See Also Programming or Comparative—*Knoxville B/cing Co.*)

License, Modification
(See: AM Station, Class II Secondary—*AM Clear Channels*)

Maritime Service, Shipboard, Violations
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Multipoint Distribution Service, Authorization
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Nighttime Coverage
(See: AM Station, Class II Secondary—*AM Clear Channels*)

Nondisclosure
(See also: Application, Amendment of, Engineering Change—*Lee Optical & Assn. Co.*)

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(See: Application, Amendment of, Engineering Change—*Lee Optical & Assn. Co.*)

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—*Opal Chadwell*
MM Docket No. 85-269

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(See: Divestiture—*CCI Cablevision*)

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(See: CATV Carriage, Significant Viewing Test—*Taft TV & Radio Co., Inc.*)

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—*Seattle Public Schools*
MM Docket No. 86-49

(See also: Application, Mutually Exclusive—*Seattle Public Schools*)

Satellite Domestic Communications
Applications to construct and launch space stations in domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.

—Alascom, Inc.

Applications to construct and launch space stations in the domestic fixed satellite service granted conditioned on applicant's submitting evidence of parent corporation's commitment to provide support.
—American Satellite Company

Applications to construct and launch space stations in the domestic fixed-satellite service dismissed at applicant's request.
—American Tel. & Tel. Co.

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
—Cablesat General Corp.

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
—Columbia Communications Corp.

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—Comsat General Corp.

Applications to construct and launch space stations in the domestic fixed-satellite service dismissed at applicant's request.
—Digital Telesat, Inc.

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
—Equatorial Communications Services

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—Federal Express Corp.

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—Ford Aerospace Satellite Serv. Corp.

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—GTE Satellite/GTE Spacenet

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—Hughes Communications Galaxy, Inc.

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—Martin Marietta

Applications to construct and launch space stations in the domestic fixed-satellite service denied on applicant's failure to demonstrate requisite financial qualifications.
—National Exchange, Inc.

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
—Rainbow Satellite, Inc.

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—RCA American Com., Inc.

Applications to construct and launch space stations in the domestic fixed-satellite service granted conditioned on applicant's submitting evidence of parent corporation's commitment to provide support.
—Satellite Business Systems

Applications to construct and launch space stations in the domestic fixed-satellite service denied. Proposal fails to meet requisite technical standards.
—Systematics General Corp.

Applications to constuct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
—U. S. Satellite Systems, Inc.

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—Western Union Telegraph Co.

Satellite Lauch Authority
(See: Satellite Domestic Communications — *Alascom. Inc.*)

(See also: Satellite Domestic Communications — *American Satellite Company*)

(See also: Satellite Domestic Communications — *American Tel. & Tel. Co.*)

(See also: Satellite Domestic Communications — *Cablesat General Corp.*)

(See also: Satellite Domestic Communications — *Columbia Communications Corp.*)

(See also: Satellite Domestic Communications — *Comsat General Corp.*)

(See also: Satellite Domestic Communications — *Digital Telesat. Inc.*)

(See also: Satellite Domestic Communications — *Equatorial Communications Services*)

(See also: Satellite Domestic Communications — *Federal Express Corp.*)

(See also: Satellite Domestic Communications — *Ford Aerospace Satellite Serv. Corp.*)

(See also: Satellite Domestic Communications — *GTE Satellite/GTE Spacenet*)

(See also: Satellite Domestic Communications — *Hughes Communications Galaxy, Inc.*)

(See also: Satellite Domestic Communications — *Martin Marietta*)

(See also: Satellite Domestic Communications — *National Exchange, Inc.*)

(See also: Satellite Domestic Communications — *Rainbow Satellite, Inc.*)

(See also: Satellite Domestic Communications — *RCA American Com., Inc.*)

(See also: Satellite Domestic Communications — *Satellite Business Systems*)

(See also: Satellite Domestic Communications — *Systematics General Corp.*)

(See also: Satellite Domestic Communications — *U. S. Satellite Systems, Inc.*)

(See also: Satellite Domestic Communications — *Western Union Telegraph Co.*)

Satellite Orbit
(See: Satellite Domestic Communications — *Alascom. Inc.*)

(See also: Satellite Domestic Communications — *American Satellite Company*)

(See also: Satellite Domestic Communications — *American Tel. & Tel. Co.*)

(See also: Satellite Domestic Communications — *Cablesat General Corp.*)

(See also: Satellite Domestic Communications — *Columbia Communications Corp.*)

(See also: Satellite Domestic Communications — *Comsat General Corp.*)

(See also: Satellite Domestic Communications — *Digital Telesat. Inc.*)

(See also: Satellite Domestic Communications — *Equatorial Communications Services*)

(See also: Satellite Domestic Communications — *Federal Express Corp.*)

(See also: Satellite Domestic Communications — *Ford Aerospace Satellite Serv. Corp.*)

(See also: Satellite Domestic Communications — *GTE Satellite/GTE Spacenet*)

(See also: Satellite Domestic Communications — *Hughes Communications Galaxy, Inc.*)

(See also: Satellite Domestic Communications — *Martin Marietta*)

(See also: Satellite Domestic Communications — *National Exchange, Inc.*)

(See also: Satellite Domestic Communications — *Rainbow Satellite, Inc.*)

(See also: Satellite Domestic Communications — *RCA American Com., Inc.*)

(See also: Satellite Domestic Communications — *Satellite Business Systems*)

(See also: Satellite Domestic Communications — *Systematics General Corp.*)

(See also: Satellite Domestic Communications — *U. S. Satellite Systems, Inc.*)

(See also: Satellite Domestic Communications — *Western Union Telegraph Co.*)

Site Availability
(See: Diversification See also Ownership — *Arizona Number One Radio, Inc.*)

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest
—*Alascom. Inc.*

FCC 85-404

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of

ALASCOM, INC.

File Nos.
926-DSS-P/L-84
927-DSS-P/L-84
928-DSS-P-84

For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of Alascom, Inc. (Alascom) for authority to construct, launch and operate its second and third 4/6 GHz domestic satellites and to construct a fourth as an on-ground spare. Comments were filed by American Satellite Company (ASC) and Western Union Telegraph Company (Western Union). Ford Aerospace Satellite Services Corporation (Ford) filed a Petition to Deny. For the reasons discussed below, we grant Alascom's

applications to construct and launch a second in-orbit satellite and to construct an on-ground spare.

2. Alascom is a satellite common carrier wholly owned by Pacific Telecom, Inc.[1] It is the principal "long-lines" communications carrier providing interstate telephone service to Alaska. Alascom presently owns and operates one domestic fixed-satellite, AURORA I, in the 4/6 GHz bands.[2]

3. Alascom's proposed AURORA II and III satellites and ground spare will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 10 watts. The proposed satellites would to provide two types of coverage. Type I coverage serves Alaska; Type II coverage serves Alaska, the contiguous United States and Puerto Rico/U. S. Virgin Islands, and Hawaii. AURORA II will use 24 transponders to provide Type II coverage, with twelve of the transponders providing service to Hawaii. AURORA III and the ground spare will be capable of providing both Type I and Type II coverages with switchable Type I or Type II coverages in the horizontal down-path polarization. Alascom proposes to launch the satellites in June, 1989 and February, 1991. It requests orbital locations of 141° W. L. and 137° W. L. Services are proposed to be offered on a common carrier basis. It estimates that the cost to construct and launch the proposed satellites and to operate them for one year is $313.6 million. Alascom asserts that both it and its parent, Pacific Telecom, Inc., have sources of funds substantially in excess of the required amounts. Alascom further asserts that its proposed AURORA III satellite is necessary to permit Alascom to meet its existing and projected requirements for in-orbit restoral capacity.

4. ASC and Ford argue that action on Alascom's applications should be deferred because they are premature in light of the requested launch dates. ASC and Ford also assert that the application for a third in-orbit satellite should be denied because it is, by Alascom's admission, to be used primarily as an in-orbit spare. It is also argued that the requested 141° W.L. assignment should be denied because it would give Alascom two contiguous orbital locations. (Alascom's in-orbit satellite is currently assigned 143° W. L.). In addition, Hughes argues that Alascom is entitled to only one additional location, not two as it requests. Alascom responds that applicants requesting less desirable locations west of 122.5° W. L. can be accommodated and should be granted, that

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[1] PacificCorp in turn owns 88% of Pacific Telecom's outstanding stock.

[2] *See* Alascom, Inc., FCC 82T-25 (October 25, 1982).

Alascom's unique dependence on satellites requires an in-orbit spare and that the requested launch dates reflect Alascom's fairly lengthy procurement process. It also states that because new operators previously assigned two initial locations as a matter of policy would now be provided one expansion location, Alascom, which is currently assigned only one location, should be granted two additional locations.

5. We find that Alascom is financially qualified to construct and launch its proposed system.[3] Pacific Telecom's current assets and operating income for the year ending December 31, 1984 are $93.7 million and $66.9 million, respectively. In addition, Pacific Telecom has a revolving bank line of credit and term loan agreement with $75 million available, and $125 million is available under Pacific Telecom's umbrella loan agreement with PacificCorp. Thus, we find that Alascom has demonstrated its financial ability to construct, launch and operate its proposed system for one year.

6. In accord with our rule granting one expansion location when existing satellites are essentially filled, we will grant Alascom a second in-orbit satellite with an additional orbit position, and will dismiss its request for a third location.[4] Granting Alascom two additional locations, as it requests, would result in excessive spare capacity for its currently authorized one satellite system, especially in light of its own admission that AURORA III is to function primarily as an in-orbit spare. Moreover, we are also dismissing requests for authority to construct and/or launch satellites after 1990. AURORA III is not proposed to be launched until February, 1991. We will, however, grant Alascom authority to construct an on-ground spare.

7. Accordingly, IT IS ORDERED that Application File Nos. 926-DSS-P/L-84 and 928-DSS-P-84 ARE GRANTED and Alascom, Inc. IS AUTHORIZED to construct two domestic

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[3] *See Report and Order*, CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems upon grant.

[4] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). To the extent that issues dealing with Alascom's requested orbital assignments have been raised, they have been resolved in the *1985 Assignment Order*, FCC 85-396, adopted today, and will not be repeated here.

communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

8. IT IS FURTHER ORDERED that Alascom, Inc. IS AUTHORIZED to launch and operate one space station in the domestic Fixed-Satellite Service in accordance with the *1985 Assignment Order*, FCC 85-396, adopted today.

9. IT IS FURTHER ORDERED that Application No. 927-DSS-P/L-84 IS DENIED.

10. IT IS FURTHER ORDERED that Alascom, Inc. SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396, adopted today, as well as the terms and conditions of all other previous orders and authorizations.

11. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

	Construction Commenced	*Construction Completed*	*Launch no later than*
Aurora II	August, 1986	April, 1989	June, 1989
ground spare	August, 1988	April, 1991	ground spare

12. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Alascom, Inc., is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or *1985 Orbit Assignment Order*, FCC 85-396. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

13. IT IS FURTHER ORDERED that the Petition to Deny by

Ford Aerospace Satellite Services Corporation IS GRANTED to the extent set forth herein.

14. Alascom, Inc. is afforded thirty days from the date of release of this *Order and Authorization, supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

AM Station, Class II Secondary
AM Station, Operating Hours
Facility, Modification
License, Modification of
Nighttime Coverage
Operation, Hours of

Commission modifies special procedures established for nighttime use of Bahamian, Canadian and Mexican AM clear channels.
—*AM Clear Channels*
MM Docket No. 84-281

FCC 86-79

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Nighttime Operations on Canadian, Mexican and Bahamian AM Clear Channels	MM Docket No. 84-281

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 3, 1986; Released: February 21, 1986

BY THE COMMISSION:

1. The Commission has before it petitions for reconsideration of the *Report and Order* in this proceeding (50 Fed. Reg. 24515, pub. June 11, 1985), filed by Chabin Communications Corporation ("CCC") and by Communications Investment Corporation ("CIC"). Neither petition disputes the basic judgments made by the Commission in this proceeding regarding the nighttime use of the foreign clear channels. Rather, as set forth below, CCC and CIC seek reconsideration of only limited aspects of the decision.

2. The Commission's *Notice of Proposed Rule Making* in this proceeding proposed additional nighttime operations on the group of 14 AM frequencies which, under international agreements, had

been designated as Canadian, Mexican or Bahamian Class I-A Clear Channels.[1] Under the North American Regional Broadcasting Agreement ("NARBA") the nighttime use of Canadian Clear Channels within 650 miles of the border with Canada and the use of the Bahamian Clear Channel anywhere within 650 miles of any point in the Bahamas has been precluded. The 1968 Bilateral Agreement with Mexico was even more restrictive. It precluded the nighttime use of the Mexican Clear Channels anywhere in the United States. However, new agreements which had been or were being negotiated were expected to remove these barriers to nighttime operations. With this in mind, the Commission sought comments on how best to use this soon-to-be-available spectrum.

3. The *Notice of Proposed Rule Making* suggested treating these foreign clear channels in much the same way as the Commission had treated the U. S. Clear Channels some five years earlier. There the Commission permitted additional nighttime operations on frequencies, some of which had been reserved for the exclusive use of Class I-A station on the channel. Proposals for such new nighttime operations were acceptable for filing if they met applicable interference criteria and could demonstrate service to unserved or underserved areas or communities or the application was filed by a minority or noncommercial applicant. A substantial number of such applications had been filed on the U. S. Clear Channels. In anticipation of a similarly large number of filings for these channels, the Commission proposed the use of similar application acceptance criteria. Nonetheless, comments also were invited on alternative approaches on how to use this spectrum.

4. By far the greatest expression of interest came from existing daytime-only stations on the foreign clear channels who urged the Commission to use this opportunity to authorize nighttime operation for their stations. However, these operators opposed the acceptance criteria proposed by the Commission since their use would preclude many of these daytime-only stations from being able to file for nighttime operation. The National Black Media Coalition ("NBMC"), on the other hand, argued that there

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[1] The North American Regional Broadcasting Agreement designates seven frequencies (540 kHz, 690 kHz, 740 kHz, 860 kHz, 990 kHz, 1010 kHz and 1580 kHz) as Canadian Clear Channels and one frequency (1540 kHz) as a Bahamian Clear Channel. The 1968 United States/Mexican Bilateral AM Agreement designates seven frequencies (540 kHz, 730 kHz, 800 kHz, 900 kHz, 1050 kHz, 1220 kHz and 1570 kHz) as Mexican Clear Channels. Because the frequency 540 kHz appears on both the Canadian and Mexican lists, the total of frequencies involved is 14.

continued to be unmet need for minority-owned stations and that the Commission should use this opportunity to respond to this need. For this reason, it urged the Commission to employ the same acceptance criteria as it had adopted in the domestic clear channel proceeding. Several parties, however, questioned whether there would be significant opportunities for new stations on these frequencies.

5. In responding to the questions presented, the Commission began by determining the potential of these frequencies for additional nighttime use. As noted in the *Report and Order*, this determination was a product of extensive studies in which the Commission calculated the preclusive effect of the existing stations on these frequencies. This process consisted of examining the effect of the existing stations on these frequencies to determine if space were available to establish new stations without causing prohibited interference. Essentially, the process employed by the Commission was as follows: using standard computer programs, the Commission depicted the protected daytime contours of all existing stations on each channel in question as well as on the first adjacent channels above and below the channel. This involved computing and then plotting the contours of hundreds of stations which were superimposed on one another to show the areas in which new stations could not be established because any such station would necessarily involve prohibited overlap with existing co-channel or first adjacent station operations.[2]

6. These studies established that as a result of the extensive daytime use of these foreign clear channels by existing broadcast stations, there would be few opportunities for the establishment of new full-time stations. Moreover, most of these opportunities would arise in the more remote areas of the country. This finding corroborated comments to the same effect submitted by a number of parties to the proceeding.[3] With this in mind, the Commission developed a method for providing nighttime operation by existing daytime-only stations. Under the rules adopted by the Commis-

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[2] Although these computer-derived maps showed the applicable station contours, they were not released because they were not in a readily understandable form. Instead, in order to exemplify the results, the Commission prepared a simpler version reflecting the same information and included it as Appendix C to the *Report and Order*. Because of the interest which has been expressed in these calculations, we are releasing the draft material from which Appendix C was derived.

[3] *See e.g.*, comments submitted by Associated Communications Corporation and United Broadcasting Company of Eastern Maryland, Inc.; du Treil-Rackley; and National Radio Broadcasters Association.

sion, all daytime-only stations were to be given an opportunity to operate at night with a maximum power of 500 watts with their existing daytime antenna systems, reduced as necessary to avoid interference to existing foreign and domestic fulltime stations on these channels.[4] Those not obtaining 500 watts would be able to file for higher power up to the 500 watt limit so long as they modify their facilities to provide full protection. After five years, the limit is raised to 1000 watts, but protection is to be provided to all stations (including former daytime-only stations which operate at night with a power of 250 watts or more).

7. The Commission also made provision for the establishment of new stations in those few areas where it was possible. These, too, were subject to the power limit of 500 watts and also could increase to the 1000 watts level after expiration of the five-year period. Initially, the Commission contemplated the use of application acceptance criteria to foster the filing of applications in the areas of the country that lacked adequate service or where the application was filed by a minority or noncommercial applicant. As indicated earlier, however, the Commission's studies, and the evidence submitted, showed that few opportunities for the establishment of new stations were possible. Moreover, most of these opportunities were in unserved and underserved areas as a result of the substantial number of existing stations already operating on the foreign clear or adjacent channels. Accordingly, the Commission concluded that there was no *need* to channel growth to these areas through adoption of the non-technical criteria applicable to service in underserved areas in the foreign clear channel proceeding. The studies indicated that few, if any, opportunities were available for establishment of new stations outside of unserved or underserved areas. Thus, the Commission concluded that these foreign clear channels did not offer a meaningful opportunity for minority or noncommercial applicants to bring new radio services to well-populated areas through the creation of new full-time stations.[5] In short, the Commission's

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[4] Stations operating with less than 500 watts during the day were limited to that power at night as well. The Commission is to caluclate the power and to advise the station of this power. Unless the station objects, its license is to be modified to specify nighttime operation at this power. Notifications have been sent to all stations on the Canadian channels, and will be sent to the stations on the Bahamian and Mexican Clear Channels as soon as the necessary agreements are in place.

[5] In *Report and Order in MM Docket No. 85-39 (In the Matter of Deletion of AM Application Acceptance Criteria in Section 73.37(e) of the Commission's Rules*, FCC 85-586 (released December 12, 1985), the Commission deleted the non-technical acceptance criteria for AM stations including the special provi-

action found that application of the Commission's non-technical acceptance criteria to the foreign clear channels was not necessary to promote growth to unserved or underserved nor would establishment of special provisions for minorities measurably serve to create new full-time radio opportunities for minorities in well-served areas.

Discussion

8. Before we address the matters raised by the instant petitions for reconsideration, we believe it is necessary to clarify the original *Report and Order*. On April 12, 1995, NBMC filed a petition for review challenging the Commission's action. *National Black Media Coalition v. FCC, appeal docketed*, No. 85-4121, 2d Cir. Although it has declined to file a petition for reconsideration in this proceeding, NBMC, in its appeal, has alleged, *inter alia*, that the Commission's studies as depicted by Appendix C clearly show that new stations can be established in well-populated areas. It should be emphasized, however, that Appendix C was not intended to show conclusively where stations could be established. Rather, they depicted the areas where stations could *not* be established because of co-channel and first adjacent channel limitations. In addition to these restrictions, there are second and third adjacent channel limitations which also form a part of the interference rules under Section 73.37. Although we did not expressly state this in our *Report and Order*, these nighttime protection requirements go beyond co-channel and first adjacent channel limitations and include consideration of second and third adjacent channel requirements regarding the establishment of new stations. In doing the calculations mentioned earlier, we foresaw no need to study the second and third adjacent channels because the striking results of the studies performed on co-channel and first adjacent channels indicated that opportunities for establishment of new stations were very limited in number and would be even further circumscribed if the additional studies were performed. However, these additional studies would have required adding four channels to be studied for each channel in question. These studies were not undertaken because they would have

sions for the acceptance of minority or noncommercial applications on the 25 U. S. I–A clear channels. However, as indicated in that *Report and Order*, at para. 25, our action did not affect the preference or enhancement factor minorities may receive in a comparative license proceeding for integration of minority ownership into the overall management of station. Nor does our action here directly affect that preference.

required substantial resources and, as indicated above, would have added very little to the final conclusions reached.[6]

9. Turning to the petitions for reconsideration filed herein, we note that they raise two relatively simple issues. The CCC petition seeks clarification regarding the obligation of former daytime-only stations to provide adjacent channel protection during their new nighttime operation. CCC objects to any abandonment of such protection requirements. We can assure it that no such change was contemplated by the Commission. The CIC petition deals with the situation faced by station KALL in Salt Lake City. It operates on 910 kHz, one channel removed from 900 kHz, one of the Mexican Clear Channels. CIC points out that it operates with a directional antenna which was designed to meet service requirements of the 1940's and which has remained essentially unchanged since then. Apparently, this antenna does not permit the station to serve the additional population in areas both north and south of the station. According to CIC, no cure for this problem is possible on the station's current frequency. Thus, it urges the Commission to permit it to change frequency to 900 kHz and to allow it to operate with 1000 watts at night. According to CIC, doing so would not preclude the other possible uses of 900 kHz contemplated by the Commission.

10. Our review of the CIC request has caused us to reevaluate that part of the *Report and Order* where we concluded that it would be appropriate to permit existing daytime-only stations which operate on one of the foreign clear channels to propose use

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[6] However, because it is a relatively easy administrative chore to determine whether a new station can be established in particular location without interference as opposed to performing the elaborate studies necessary to show where these few new stations *might* be possible, we have undertaken an examination of all the areas where, NBMC alleges, new stations can be located. As indicated above, although establishement of these stations would not be precluded based upon the analysis depicted in Appendix C by co-channel and first adjacent considerations, they would be precluded by the second or third adjacent channel requirements under the interference rules in Section 73.37 if NBMC had properly taken them into account. Thus, these second and third adjacent calculations establish that 540 kHz is not available in El Paso, Texas, or San Diego, California. Similarly, 740 kHz is not available in Seattle, Washington, nor is 1050 kHz available in El Paso or Bakersfield, California. Likewise, 1580 kHz is not available in Santa Rosa, California, in Minneapolis, Minnesota, or in Buffalo, Syracuse, or Rochester, New York, or in Boston, Massachusetts, or Salt Lake City, Utah. Although we cannot, and do not, rule out completely some possibility for new full-time stations in well-populated areas if a complete study of all the additional channel adjacencies were performed, we bleieve we can say with a very high degree of engineering confidence that, realistically, the opportunities for such new stations is exceedingly small.

of another such channel but concluded against allowing other stations to move to a foreign clear channel for fear that it might disrupt effective use of these frequencies at night. We do not believe special provision should be made to allow existing daytime-only stations on a foreign clear channel to change to another such channel. As the comments and the studies show, for the most part, the opportunity to change from one foreign clear to another would exist only in the remote areas where new stations could be established. Thus, because of its limited utility, this special provision does not appear to necessary. Moreover, because ample opportunity already has been provided for these stations to improve their facilities on their current channels, little additional benefit is provided by allowing such channel changes.

11. By the same token, however, we believe that a *permanent* prohibition on channel change applications by all other stations would be overly broad. In our view the best way to deal with this situation is to allow during an initial two-year period only proposals for new stations or power increases by existing daytime-only stations already operating on foreign clear channels. A two-year prohibition on channel changes will permit us to focus on the categories of applications for which there is the greatest need. Under this arrangement, daytime-only stations would be given ample opportunity to improve their facilities, a major purpose underlying the new rules, but, at the end of that two-year period, applications for channel changes by any station meeting applicable interference criteria could be accepted. However, it should be emphasized that these filings would be subject to the same terms and conditions as apply to the former daytime-only stations or the newly established stations on these frequencies. This means that they must provide full protection to existing foreign and domestic full-time stations and that nighttime power cannot exceed 500 watts. If the station's current power exceeds 500 watts, it must reduce its power to this level. In addition, any such proposal must be filed with the understanding that the station will not be given nighttime protection during the remainder of the five-year implementation period specified by the rules. Therefore, even if the station had such protection on its current channel, it will not be given nighttime interference protection against proposals for new stations or power increases by existing stations on its new channel. Finally, as with new applicants on these frequencies, a minimum nighttime power of 250 watts is to

be specified, but city coverage requirements will not apply at night.[7]

12. While this arrangement does not provide an immediate answer to CIC's request, it can be expected to offer relief in the near future if the allocation situation is as CIC describes. The only other way to act on such requests earlier would be through waiver requests, but that would require the Commission to conduct an extensive *ad hoc* study for every request that was filed. Such a procedure would be time consuming and would introduce an unacceptable burden on applicant and Commission alike. Thus, it is preferable to follow a system which provides the certainly of being able to file acceptable proposals in the future while at the same time protecting the basic purposes for which the rule itself was developed.[8]

13. Accordingly, IT IS ORDERED That the above petitions for reconsideration ARE GRANTED to the extent indicated and in all other respects ARE DENIED.

14. IT IS FURTHER ORDERED, That, pursuant to Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended, the Commission's rules ARE AMENDED as set forth in the attached appendix.

15. IT IS FURTHER ORDERED That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendix B-may be seen in the FCC Dockets Branch, 1919 M Street, N. W., Washington, D. C.

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[7] Because so few existing stations would be able to change to a foreign clear channel, we believe that the additional constraints that these stations might place on ability of former day-time only stations to improve their facilities on foreign clear channels should be minimal.

[8] Because of a delay in publication in the Federal Register, our *Report and Order*, and the rules adopted thereunder, became effective on July 11, 1985, rather than upon the June 3, 1985, date we had specified in our *Report and Order*. However, to avoid confusion over this matter, we have decided to continue use of the June 3, 1985 date specified in the *Report and Order* for purposes of computing the two year and five year interim periods described herein. In all other respects, the effective date is changed to July 11, 1985. Thus, any applications filed prior to July 11, 1985, will be processed under the previous rules.

Appendix A

1. 47 C.F.R. Section 73 is amended by revising paragraphs (a)(2) (iii) of Section 73.21 to read as follows:

§ 73.21 Classes of AM broadcast channels and stations

(a) * * *

* * * * *

(2) * * *

* * * * *

(iii) * * *

(A) * * *

(B) Class II-C stations authorized after June 3, 1985, on the 14 channels listed in § 73.25(c) or which operate for the first time on one of such channels after that date.

* * * * *

2. 47 C.F.R. Part 73 is amended by revising paragraph (d) of Section 73.3571 to read as follows:

§ 73.3571 Processing of AM broadcasting stations applications

* * * * *

(d) * * *

(1) * * *

* * * * *

(4) Special procedures apply to the 14 frequencies listed in § 73.25(c). The same procedures will be applied to each of the three frequencies or group of frequencies which are included in the above category. There are three stages to these procedures. In the first Stage, each Class II-D station will receive an Order to Show Cause why its license should not be modified to specify operation at night with the power calculated by the Commission and as shown on said Order. Stations accepting this modification will be redesignated as Class II-C if the nitghttime power is 0.25 kW or more or as Class II-S if that power is below 0.25 kW. During Stage two, stations in both groups will be given five years within which to file an application to increase this power to a maximum of 0.5kW or their daytime power, whichever is lower. During the entire period, applications for new Class II-C stations with power up to a maximum of 0.5 kW also can be filed and will be granted without regard to the nighttime interference caused to other Class II-C or to Class II-S stations but new Class II-C stations, will be required to protect foreign and domestic Class II-B full-time stations on these frequencies. In addition, after two years of the five-year period has elapsed, applications for major changes proposing to change channel to one of these frequencies will be accepted for filing. Such applications must meet all requirements and limitations applicable to Class II-C stations and will not receive nighttime protection until expiration of the five-year period. Finally, in Stage three, which occurs when the five-years period above comes to an end, Class II-C and II-S stations will be able to file applications to increase their nighttime power to 1 kW or their daytime power,

whichever is lower. Applications for new Class II–C stations (including Class II–S stations that increased power during Stage two and were redesignated as Class II–C during this period). The five-year periods of Stage two applicable to the three groups of frequencies, are set forth below:

(i) 690 kHz, 740kHz, 860 kHz, 1010 kHz and 1590 kHz: Stage two begins on June 3, 1985 and ends on May 31, 1990; Stage 3 begins on June 1, 1990.

(ii) 1540 kHz [to be established]

(iii) 540 kHz, 730, kHz, 900 kHz, 1220 kHz and 1580 kHz: [to be established]

* * * * *

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> **Applications to construct and launch space stations in the domestic fixed satellite service granted conditioned on applicant's submitting evidence of parent corporation's commitment to provide support.**
> — *American Satellite Company*

FCC 85-405

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN SATELLITE COMPANY For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 2190-DSS-LA-83 929-DSS-P/LA-84 930-DSS-P-84

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of American Satellite Company (ASC). ASC seeks authority to launch and operate a third domestic satellite in the 4/6 GHz bands and, if possible, on a temporary basis in the 12/14 GHz bands. Additionally, it seeks authority to construct, launch and operate a fourth hybrid satellite in the 4/6, 12/14, and 18/30 GHz bands, and to construct a fifth such satellite as an on-ground spare. Petitions to deny were filed by Ford Aerospace Satellite Services Corporation (Ford) and Martin Marietta Communications

Systems, Inc. (Martin Marietta).[1] Comments were filed by Satellite Business Systems (SBS) and National Exchange, Inc. (NEX). For the reasons discussed below, we grant ASC's application to construct, launch and operate a third in-orbit satellite and to construct an on-ground spare subject to certain conditions.

2. ASC is owned on an equal basis by wholly owned subsidiaries of Fairchild Industries (Fairchild) and Continental Telephone Corporation (Continental). ASC has an undivided 20 percent ownership interest in the Western Union domestic satellite system. *Western Union Telegraph Company*, 86 FCC 2d 196 (1981). It is also authorized to construct, launch and operate two hybrid satellites in the 4/6 and 12/14 GHz bands and to construct a third as on on-ground spare. *American Satellite Co.*, 94 FCC 2d 39 (1983).

3. In Application File No. 2190-DSS-LA-83, ASC requests authority to launch and operate its on-ground spare, ASC-3, which is presently under construction. This satellite carries six wideband (72 MHz) 4/6 GHz transponders and six wideband (72 MHz) 12/14 transponders. Coverage of all 50 states can be provided at 4/6 GHz, but only the 48 contiguous states are covered at 12/14 GHz.[2] It plans to launch this satellite in November, 1992. In Application File Nos. 929-DSS-P/LA-84 and 930-DSS-P-84, ASC requests authority to construct, launch and operate a hybrid domestic fixed-satellite, ASC-4, in the 4/6, 12/14 and 18/30 GHz bands and to construct another such satellite as an on-ground spare. The proposed satellites will each carry 24 transponders at 4/6 GHz each with a bandwidth of 36 MHz and a nominal transmitter output power of 9 watts; 19 transponders at 12/14 GHz, each with a bandwidth of 54 MHz and a nominal transmitter output power of 21 watts; and 3 transponders at 18/30 GHz, each with a bandwidth of 500 MHz and a nominal transmitter output power of 8 watts. Twelve of the 4/6 GHz transponders can also be paired to provide six transponders, each with a bandwidth of 72 MHz and a nominal transmitter output power of 17 watts. At 4/6 GHz, coverage will be provided of the contiguous states, Puerto Rico/U.S. Virgin Islands, Alaska and Hawaii. At 12/14 GHz, coverage will be provided to the contiguous states by 15 transponders, and up to 4 transponders can be switched from contiguous states coverage into an eastern and a western spot beam. Three independently positionable spot beams

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[1] A Motion to Dismiss was also filed by Martin Marietta.

[2] The technical specifications of this satellite are specified in Application File No. 523-DSS-P-81. *See* Public Notice DS-23 (December 23, 1981).

will be provided at 18/30 GHz. The requested orbit location is 93° W.L. Services are proposed to be offered on a common carrier basis. ASC proposes to launch ASC-4 in November, 1990.

4. ASC estimates that the cost to construct ASC-4 and ASC-5 and to launch and operate ASC-3 and ASC-4 for one year is $280 million.[3] ASC asserts that its steady revenue growth, the financial strength of its parent companies, its ability to obtain lines of credit, and the fact that it has expended or committed over $100 million towards its previously authorized system, demonstrates its financial qualifications. ASC also asserts that it requires two additional in-orbit satellites to meet customer demand.

5. Ford, Western Union and Martin Marietta argue that ASC has not adequately justified its request for two expansion satellites, and Ford adds that none of the proposed satellites meets the Commission's technical standards for state-of-the-art designs.[4] Martin Marietta argues that the requests 93° W.L. location is not identified as a hybrid location in the *1983 Assignment Order*,[5] and would require the relocation of three in-orbit satellites. Ford and Martin Marietta contend that ASC does not have adequate funds to finance its system. ASC replies that its request is not inconsistent with the *1983 Assignment Order*, that all required information has been provided, that its proposed satellites meet Commission technical standards, and that its status as an on-going satellite business with parent companies whose financial records are a matter record before the Commission demonstrate its financial qualifications.

6. We find that ASC would be financially qualified pursuant to our rules governing the financial qualifications of domestic fixed-satellite operators if its assertion that it can rely on the funds of its parent is justified.[6] The cost of ASC's proposed satellites is $280 million. ASC's balance sheet indicates that it has $26.6 million in current assets. It also submits the balance sheets

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[3] Construction of ASC-3 may be completed using the $315 million credit facility ASC had obtained to finance the construction and launch of ASC-1 and ASC-2 and the construction of ASC-3.

[4] Specifically, it asserts that the 4/6 GHz transponders on ASC-3 are underpowered and that the 12/14 GHz transponders on ASC-4 and 5 are underpowered and have insufficient bandwidth.

[5] *Domestic Fixed-Satellite Service*, 93 FCC 2d 1260 (1983).

[6] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982).

of its parent companies, Fairchild and Continental, indicating current assets of $586 million and $691 million, respectively, and states that, if required, its parents will provide necessary support.[7] It appears that this support is required. Although we conclude that Fairchild and Continental have the ability to finance the proposed satellites, no evidence has been submitted from the management of either Fairchild or Continental indicating a commitment to assist in financing ASC's proposed system. Our proposed rules on this point did not specifically state — although they did imply — that a management commitment from an applicant's parent corporation was required. Because ASC could have misunderstood our proposed rules, and because we would find it financially qualified if its parent corporations were committed to making available the necessary funds, we will issue it conditional grants as reflected in para. 16, below. These grants will be conditioned on ASC submitting evidence of management commitments from one or both of its parent companies as described in Section 25.391(d)(1) of our rules within 30 days of the release of this order. Failure to fulfill this requirement by that date will automatically render the grants null and void.

7. In accord with our rule granting one expansion location when existing satellites are essentially filled,[8] we will grant ASC conditional authority to construct and launch its ASC-4 satellite,[9] and will not grant it authority to launch its ASC-3 ground spare which is not needed until 1991.[10] Because ASC-4 is of a more efficient technical design than ASC's currently authorized satellites, we will also grant it conditional authority to construct a fifth satellite of this design as an on-ground spare.

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[7] Martin Marietta argues that Fairchild and Continental do not have sufficient resources on hand to finance ASC satellite system. We find that their balance sheets evidence their ability to assist in financing ASC's proposed system.

[8] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

[9] In light of ASC's representations and our reconsideration of the technical requirements enunciated in *Reduced Orbital Spacing*, 54 Rad. Reg. 577 (P&F) (1983), *recon.*, FCC 84-487 (released January 9, 1985), we find that ASC-4 meets the required technical standards. The satellite will obtain full frequency reuse in both bands. Further, other issues raised by the parties with respect to orbital assignments are resolved in the *1985 Assignment Order*, FCC 85-396, adopted today.

[10] As discussed in the *Report and Order*, FCC 85-395, we will not act on applications for domestic satellites needed after 1990. In addition, because authority to launch this satellite is being denied, Ford's comments regarding its technical efficiency need not be addressed. This matter will be considered when, and if, ASC renews its request to launch this satellite.

8. Accordingly, IT IS ORDERED that Application File Nos. 929-DSS-P/LA-84 and 930-DSS-P-84 ARE GRANTED and American Satellite Company IS AUTHORIZED to construct two domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

9. IT IS FURTHER ORDERED that American Satellite Company IS AUTHORIZED to launch and operate one space station in the domestic Fixed-Satellite Service in accordance with the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985).

10. IT IS FURTHER ORDERED that Application File No. 2190-DSS-LA-83 IS DENIED.

11. IT IS FURTHER ORDERED that American Satellite Company SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985), as well as the terms and conditions of all other previous orders and authorizations.

12. IT IS FURTHER ORDERED that these authorizations shall become null and void in the event American Satellite Company fails to provide evidence of the required financial commitment from its parent companies within 30 days of the release of this order in accordance with the policies specified in the *Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

13. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

	Construction Commenced	*Construction Completed*	*Launch no later than*
ASC #4	January, 1987	June, 1990	September, 1990
ASC #5	July, 1987	December, 1990	ground spare

14. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Satellite Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or the *1985 Orbit Assignment Order*, FCC 85-396. Neither this authori-

zation, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

15. IT IS FURTHER ORDERED that the Petitions to Deny filed by Ford Aerospace Satellite Services Corporation and Martin Marietta Communications Systems, Inc. ARE DENIED to the extent set forth herein.

16. American Satellite Company is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service dismissed at applicant's request.
—*American Tel. & Tel. Co.*

FCC 85-406

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY	File Nos. 931-DSS-P/LA-84
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. By letter dated June 3, 1985, American Telephone and Telegraph Company (AT&T) notified the Commission that it was withdrawing the above-captioned application from Commission consideration. In its application, AT&T requested authority to construct, launch and operate a replacement satellite for the COMSTAR D4 satellite.

2. Accordingly, IT IS ORDERED that the application of American Telephone and Telegraph Company to construct, launch and operate a satellite in the domestic Fixed-Satellite Service,

Application File No. 931-DSS-P/LA-84 IS DISMISSED per applicant's request.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Diversification See Also Ownership
Frequency Equitable Distribution of Under 307(b)
Ownership and Management, Integration of
Site Availability

In hearing matter of seven mutually exclusive CP applications for new FM station, Review Board reversed ALJ's grant based on a Section 307(b) preference. Board held that Section 307(b) was not dispositive and went on to award the grant to the applicant selected by the ALJ as the best comparative applicant. Board declined to add a transmitter site availability issue against applicants proposing site on land owned by the Bureau of Land Management.

—Arizona Number One Radio, Inc.
MM Docket No. 84-245

FCC 86R-16

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
ARIZONA NUMBER ONE RADIO, INC. Glendale, Arizona	MM Docket No. 84-245 File No. BPH-820514AP
INTERSTATE BROADCASTING SYSTEM OF ARIZONA, INC., Glendale, Arizona	MM Docket No. 84-246 File No. BPH-8205211AM
Hector P. Torres and Adib Eden, Sr. d/b/a ARIZONA FAMILY RADIO, LTD. Glendale, Arizona	MM Docket No. 84-247 File No. BPH-820618AP
NEWMOUNTAIN BROADCASTING CORPORATION Glendale, Arizona	MM Docket No. 84-248 File No. BPH-820621AK

COMPADRES COMMUNICATIONS CORPORATION Glendale, Arizona	MM Docket No. 84-249 File No. BPH-820622AD
DIANE M. GREENLEE Glendale, Arizona	MM Docket No. 84-249 File No. BPH-820623AM
LEE OPTICAL & ASSOCIATED COMPANIES RETIREMENT & PENSION FUND TRUST Peoria, Arizona	MM Docket No. 84-256 File No. BPH-820624AT

For Construction Permit for a New FM Station

Appearances

Edward Hayes, Jr., on behalf of Arizona Number One Radio, Inc.; *Morton L. Berfield* and *Lewis I. Cohen*, on behalf of Interstate Broadcasting System of Arizona, Inc.; *Donald C. Jerome, pro se*, on behalf of Newmountain Broadcasting Corporation; *John A. Borsari* and *Michael I. Endler*, on behalf of Compadres Communications Corporation; *Harry G. Sells*, on behalf of Diane M. Greenlee; and *Howard M. Liberman* and *Nora E. Garrote*, on behalf of Lee Optical & Associated Companies Retirement & Pension Fund Trust.

DECISION

Adopted: March 20, 1986; Released: March 26, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Arizona Number One Radio, Inc. (Arizona Radio), Interstate Broadcasting System of Arizona, Inc. (IBS), Arizona Family

Radio, Ltd. (Family), Newmountain Broadcasting Corporation (Newmountain), Compadres Communications Corporation (CCC), Diane M. Greenlee (Greenlee), and Lee Optical & Associated Companies Retirement & Pension Fund Trust (Lee Optical)[1] for authority to construct a new commercial FM broadcast station to operate on Channel 287C in either Glendale or Peoria, Arizona. All of the applicants, save Lee Optical, proposed Glendale as their community of license. Lee Optical has proposed the nearby community of Peoria. By *Hearing Designation Order* (*HDO*), 49 FR 10578, published March 21, 1984 (Mimeo No. 2883), these applications (along with eight others subsequently dismissed) were designated for hearing on, *inter alia*, an issue to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), which of the proposals would best provide a fair, efficient, and equitable distribution of radio service, and on a contingent comparative issue.

2. In an *Initial Decision (I. D.)*, FCC 85D-40, released June 17, 1985, Administrative Law Judge (ALJ) Joseph Chachkin granted Lee Optical's application, concluding under the Section 307(b) issue that it was entitled to a dispositive preference over the Glendale applicants by virtue of its proposal to provide a first local outlet to Peoria. He further found that, under the contingent standard comparative issue, Newmountain would have been the preferred applicant, had the Section 307(b) issue not been dispositive. This proceeding is now before the Review Board on exceptions relating to the ALJ's failure to add a transmitter site availability issue requested by Arizona Radio against all of the other applicants, the Section 307(b) issue, and the contingent standard comparative issue.[2] We have reviewed the *I. D.* in light of the exceptions and reply briefs,[3] the oral argument held

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[1] On October 4, 1985, Lee Optical filed a petition for leave to amend its application to substitute Peoria Broadcasting Corporation (PBC) for Lee Optical as the applicant in this proceeding. Lee Optical would own 51% of PBC and B. J. Glascock would own 49%. We will grant the petition for leave to amend, but for the sake of clarity, we will continue to refer to the applicant as Lee Optical.

[2] Family did not file exceptions to the *I. D.'s* denial of its application. Accordingly, we will dismiss its application with prejudice for failure to prosecute. Section 1.276(f) of the Commission's Rules, 47 CFR 1.276(f).

[3] Lee Optical filed a motion to strike certain portions of Newmountain's exceptions on the ground they rely on material not in evidence. Our own examination of Newmountain's exceptions reveals that various assertions of alleged findings refer for support to only its own proposed findings of fact. The Board has previously stated that it expects parties to support factual allegations with record citations, and that references to parties proposed findings of fact do not comply with our rules. *See Filing Exceptions & Briefs*

November 8, 1985, the ALJ's *Memorandum Opinion and Order*, FCC 84M-3382, released August 3, 1984, denying the site issues and related pleadings,[4] and our independent examination of the record. Based on our review, we adopt the findings of fact and conclusions of law in the *I.D.*, except as noted herein, and conclude (1) that the applicants have amply demonstrated that they had the requisite "reasonable assurance" for their particular transmitter sites; (2) that the Section 307(b) issue is not dispositive in this proceeding; and (3) that the ALJ was correct in finding that Newmountain prevails under the standard comparative issue.

3. *Transmitter Site Availability Issue.* By *Memorandum Opinion and Order*, FCC 84M-3382, released August 3, 1984, the ALJ denied a motion to enlarge issues, filed by Arizona Radio on April 16, 1984, requesting a transmitter site availability issue against the other five applicants yet remaining in this proceeding. Those five applicants proposed transmitter sites located in the White Tank Mountains, an area that is managed by the Bureau of Land Management (BLM) of United States Department of Interior. The basis for the requested hearing issue was a memorandum from Arthur E. Tower, Area Manager, Phoenix Resource Area BLM, to the Federal Communications Commission, dated November 8, 1982, stating: "BLM has not taken any actions nor made any final decisions regarding the . . . applications presently filed with us . . . for a site on White Tank Mountains." The Tower memorandum went on to advise that "there are serious issues and conflicts which would have to be dealt with in reaching a decision on the application[s]." In denying the site issue, the ALJ believed that the Tower memorandum did no more than suggest that some opposition could be voiced when the winning applicant sought final BLM approval. Additionally, the BLM memorandum neither stated nor implied that its final approval would be denied simply because any such objections might eventuate.

4. The ALJ's denial of the requested site issue is, to us, a somewhat close judgmental call. However, under the particular circumstances here, we will deny Arizona Radio's exception on

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Before Review Board, 69 FCC 2d 1193 (Rev. Bd. 1978). We will not act on the motion to strike, however, since the factual allegations are not of decisional significance.

[4] At oral argument, the Board gave the parties thirty days (subsequently extended until December 30, 1985), in lieu of possible remand, to obtain a letter from the Bureau of Land Management, United States Department of Interior, that might shed additional light on the availability of a transmitter site. *See* Tr. of Oral Arg. of November 8, 1985 at 1100-1101.

this matter. Although an applicant need not have a binding agreement or an absolute guarantee of the availability of a proposed transmitter site, *see Alden Communications Corp.*, 59 RR 2d 259 (Rev. Bd. 1985) (and cases cited therein), it has been long settled that an applicant must show that it has obtained "reasonable assurance" that its proposed transmitter site will be available should it eventually receive the grant. *See e.g., Marvin C. Hanz*, 21 FCC 2d 420 (Rev. Bd. 1970). A "mere possibility, assumption, or hope that the site will be available will not suffice." *Houston Family Television, Ltd.*, 101 FCC 2d 661, 664 (Rev. Bd. 1985) (applications for Common review pending). There is, however, more than one way in which such "reasonable assurance" may be shown. *See generally Alden Communications Corp., supra* at 260. Thus, "when an applicant who has obtained reasonable assurance from the landowner must also obtain a zoning change or equivalent further approval by a governmental authority to use the site for broadcast transmission, it nevertheless need not demonstrate such actual approval to the Commission; zoning-type approval is assumed absent indications that it is unlikely to occur." *Id.* Here, it appears that the subject applicants duly contacted the BLM prior to filing their applications, and also received some general indication that the particular BLM land would be available to the winning applicant. *See* Letter from BLM to IBS, March 12, 1982 (attached to IBS's May 15, 1984 Opposition to Motion to Enlarge Issues), which letter stated that "there is presently an *undeveloped designated communications site that is available for an FM station*, north of the present established sites." (Emphasis added). Newmountain, for example, represented that it has made two on-site surveys of the White Tank Mountains "Designated Communications Sites," and that BLM officials personally guided it in the selection of its specific site.[5] After the proposed sites were brought into question by Arizona Radio, various principals of the other applicants again checked with the BLM (*i.e.*, Mr. Tower), and were informed that their proposed sites were not being denied to them, but that there remained certain concerns that would have to be addressed and worked out by that applicant eventually receiving the actual FCC grant. Subsequent to the Board's oral argument, where the question of site availability was raised once more, the applicants *again* approached the BLM to obtain additional clarification of its position. In response, they were informed simply that the site situation had not changed at all since the 1982 Tower memorandum to the Commission. *See* BLM Letter to IBS' Consulting Engineer, November 27, 1985 (attached to IBS Report filed December 19, 1985). Similarly, in its December 30, 1985 report, CCC submitted a BLM letter of August 2, 1982, advising it that any "meeting to discuss any applicant's proposal for use of the White Tanks area for an FM station transmitter site would be premature, if conducted prior to FCC's decision on the license for the facility." In other words, the matter of final approval of the proposed White Tank Mountains sites was, and remains, effectively sandwiched in a bureaucratic gridlock.

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[5] Newmountain Report, filed December 30, 1985, at p. 5; *see also* Affidavit of Ralph Borkman, President of CCC, attached to Opposition to Motion to Enlarge Issues, filed May 8, 1984 (describing its own negotiations with BLM).

5. It appears from the facts above that the affected applicants have done virtually everything in their own power to affirm acceptable "reasonable assurance" of their proposed White Tank Mountain sites, but could obtain no finite guarantees that final BLM approval would be granted. The underlying problem here seems to be, of course, the BLM's internal policy of not taking final action on applications for use of the White Tank Mountains "designated communications area" until after this Commission makes its own *final* grant of a construction permit to one of the competing applicants. That circumstance makes this case distinguishable, for example, from *Alden Communications Corp., supra*, where the record showed that the filing of a written application by a broadcast applicant proposing a site on land owned by the Arizona State Land Department was an absolute prerequisite to the triggering of Land Department action to determine whether a commercial lease would be forthcoming. There, in the complete absence of even the filing of such an application with the proper Arizona authority, the proceeding was remanded on a site availability issue. Here, by contrast, the subject applicants might have even been led, indirectly, by the Commission's *HDO* to select transmitter sites specifically in the White Tank Mountains.[6] And, thereafter, those applicants were generally advised by the BLM that land for the proposed radio transmitter sites was physically available, albeit not without probable opposition from

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[6] At para. 30 of the *HDO*, the Commission quotes, as follows, from language in its *Report and Order*, 50 RR 2d 58, 61 (1981) assigning Channel 278 to Glendale: "[T]he Commission will expect that any applicant for Channel 278 at Glendale specify facilities sufficient to provide first aural and first FM service at least equivalent to that proposed by JBS [one of the parties who petitioned for the original assignment]." JBS had proposed a site in the White Tank Mountains and would provide a first aural and first FM service to a little less than 1,670 persons. *HDO*, para. 31.

other interested parties. After specifying their sites, the White Tank Mountain applicants continued to maintain informal communications with BLM personnel to ensure that the sites had not, in the interim, become unavailable to them. *See, e.g.*, Newmountain Report, *supra* note 5, where the applicant represents that it has conducted more than twenty discussions, with at least seven different BLM employees, over the past six and a half years. Consequently, on the basis of all of the facts already on record in this case, we agree with the ALJ's conviction that little would be gained from a further evidentiary hearing on the site issue that is not already known, and we affirm his denial of the requested transmitter site issues.

6. The *real* questions pregnant here are whether, given the BLM's policy of finally approving sites only on a *post*-FCC grant basis, the White Tank Mountain applicants erred irredeemably in claiming the requisite "reasonable assurance" to their sites in their original applications, and whether they should have been summarily disqualified by the ALJ for having done so. Based upon the facts of record, and because any persisting uncertainty over final approval of the available White Tank Mountain land rests exclusively in the hands of a sister federal agency which will not commit to final approval until *after* our own licensing proceeding, we will here give the subject applicants the benefit of the remaining doubt on the matter of whether they properly claimed "reasonable assurance" to their sites. *Compare Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984, *aff'd sub nom. Royce International Broadcasting Co. v. FCC*, 762 F. 2d 138 (D. C. Cir. 1985). There, the disqualified applicant was unequivocally informed by the responsible federal official that its site *could not* be used for broadcast transmission; but that applicant failed to even inform the Commission of the official rejection of its site, and it continued thereafter to affirmatively *insist* that the site was, nonetheless, assured to it. The real *answer*, in our present straits, lies plainly in interagency discussions with the BLM — in the nearest future — so as to fully explain this Commission's *advance* site availability requirements. Such discussions, we believe, should urge upon the BLM a rapprochement similar to that arrangement we have long had with the FAA, in which a *pre-hearing* FAA review mechanism permits us to select the best comparative applicant, without the uncertainty of the official reticence on the ultimate site suitability matter we are faced with in the case at hand. While we would have much preferred that the affected

applicants had been more circumspect in proceeding through the Commission's application and hearing process on their own confident expectation of final BLM approval of a White Tank Mountain "designated communications" site, we will, under the peculiar circumstances obtaining, forbear from triggering what Judge Mikva has called "the blunderbuss of disqualification."[7] Therefore, but not without some lingering misgivings, we affirm the ALJ's essential treatment of this unusual transmitter site question.[8] The "assurance" claimed by the affected applicants seems, in this case, not to have been so clearly or utterly speculative as to warrant their complete disqualification.

7. *Section 307(b) Issue.* Section 307(b) of the Communications Act requires the Commission, when considering applications for licenses, to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b). In *Debra D. Carrigan*, 100 FCC 2d 721, 727 (Rev. Bd. 1985) (applications for Comm'n review pending), the Board outlined three main lines of Section 307(b) case law, noting that these multitudinous cases yielded, in essence, three general types of Section 307(b) "models." The *Carrigan* Board observed that the case law applicable to what it labeled the "traditional model" (which precedent involves a comparison of communities that are demonstrably separate and distinct, of appreciable size, are self governing, and not economically or culturally dependent on a larger nearby city) holds that every community having no local transmission service. *See generally, Carrigan, supra*, 100 FCC 2d at 727 (and cases cited therein). A recent example of a "traditional model" case is found in *WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132 (D. C. Cir. 1985) (remanded on other grounds). Here, the ALJ analyzed the Section 307(b) issue as falling within the ambit of that "traditional model," holding that Peoria was sufficiently a separate and distinct "community," despite being essentially tangential to the much larger city of Phoenix, Arizona. *I. D.*, para. 82. In consequence, the *I. D.* concluded that the "radio needs" of Peoria were greater than those of the adjacent "community" of Glendale, because Peoria has no broadcast outlet

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[7] *WADECO, Inc. v. FCC*, 628 F. 2d 122, 133 (D. C. Cir. 1980) (dissenting opinion).

[8] In light of clear BLM policy to *defer* application processing pending actual FCC grant of a construction permit, we do not consider it significant that not all of the applicants have already formally filed their applications for use of the land with the BLM. *Compare Alden Communications Corp. supra.*

licensed directly to it, while Glendale currently has two. *Id.*, para. 78-79.

8. The Glendale applicants argue here that the so-called "traditional model" is not the appropriate touchstone for the Section 307(b) analysis in this case: they contend, rather, that (1) the power and class of station, (2) the size, proximity and dependence on the nearby central city of Phoenix, and (3) the population coverage aspects, all conjoin to place this case within what *Carrigan* referred to as the "suburbanite model" line of cases. *See* 100 FCC 2d at 728-731 (and cases cited therein). In such situations, no Section 307(b) preference is awarded, because the specified "community" is — in actuality — not much more than an identifiable geographic construct within an established metropolitan area, and the proposed station will, in fact, provide wide-area (or "regional") signal coverage to that much greater metropolitan area. *See also, e.g., Hispanic Owners, Inc.*, 99 FCC 2d 1180. (Rev. Bd. 1985) (applications for Common review pending). We agree with the Glendale applicants, and conclude that this case is controlled by the precedent most recently reflected in *Carrigan, supra*, and *Hispanic Owners*, two 1985 cases that we found to fall into the "suburbanite model." *Carrigan*, for example, involved a contest for a new Class C FM broadcast station officially allocated to North Las Vegas, Nevada. Pursuant to (former) rule 47 CFR § 73.203(b), which permitted the use of the allocated frequency for any "community" located within 15 miles of that city, one of the *Carrigan* applicants specified Paradise, Nevada, and was — in the ALJ's initial decision — awarded a dispositive Section 307(b) preference over the North Las Vegas applicants.[9] The Board, however, reversed that result, accepting as correct the contention of the exceptors, *inter alia*, that Class C FM channels were expressly intended by the Commission for "regional" coverage in the western states. *See* 100 FCC 2d at 733. The *Carrigan* Board further found that (1) the communities of North Las Vegas and Paradise were located within five miles of one another within the Las Vegas standard metropolitan statistical area; (2) that all of the applicants proposed a transmitter site at the top of the identical mountain; and (3) that the "community" of Paradise was commercially and culturally indistinguishable from the larger city of Las Vegas or, more generally, from the greater Las Vegas metropolitan area. Accordingly, the Board could find no factual or

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[9] The 15-mile rule was eliminated in 1983, *Suburban Community Policy*, 93 FCC 2d 436, 451-453 (1983), *appeal pending sub nom. Beaufort County Broadcasting Co.* v. *FCC*, No. 84-1384 (D. C. Cir. filed August 1, 1984).

legal basis for a meaningful Section 307(b) preference, and it went on to assess all of the *Carrigan* applicants under the standard comparative issue. Similarly, *Hispanic Owners* involved a contest for another western U. S. Class C FM frequency, a channel officially allocated to the city of Albuquerque, New Mexico. One of the competing applicants there, however, proposed the nearby Albuquerque suburb of Rio Rancho. Based on the factual record in that case as well, the Board — as per *Carrigan* — reversed a dispositive Section 307(b) preference award to the Rio Rancho applicant, and it proceeded to compare all of the applicants on the customary comparative criteria. *See* 99 FCC 2d at 1188–1193.

9. Here, as in the two recent cases discussed above, the available frequency is a high-power Class C FM channel intended expressly for "wide area" coverage in the western states. *See First Report and Order*, 40 FCC 662, 677 (1962) (defining Class C FM stations as intended to provide "wide area coverage" in the western U. S.). The two instant "communities," Peoria and Glendale, have populations of 12,251 and 97,172, respectively (1980 U. S. Census); they are located directly adjacent to each another, *and* to Phoenix. Both are situated squarely within the Phoenix "urbanized area," a total metropolitan area of nearly one and a half million persons (1980 U. S. Census). Furthermore, the technical proposals of the Peoria applicant and most of the Glendale applicants offer substantially similar signal coverage. That is, nearly all of the competing applicants here would place a "city-grade" signal over the entire Phoenix metropolitan area.[10] And, Phoenix itself, with more than three quarters of a million population, obviously serves as the economic, social, and cultural hub of the proposed service area of all of the instant applicants. As we review this record, therefore, any slight differences between the operative facts of this case and those in *Carrigan* and *Hispanic Owners* are not decisionally meaningful. Accordingly, we must also here find that no Section 307(b) preference should be given to any of these applicants for the particular Class C FM frequency at contest.[11]

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[10] Newmountain notes that the Phoenix Metropolitan Area contains about 1400 square miles while the applicants' city grade contour encompases 5674 square miles. Glendale and Peoria contain 44.5 and 28.73 square miles, respectively. Newmountain adds that the service area will encompass 10,387 square miles. Newmountain Br. at 15, 20–21.

[11] In passing, we repeat an observation we have made in *Carrigan* and *Hispanic Owners*, that in the two most prominent cases in which the court of appeals has reversed the Commission's treatment of Section 307(b), *Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d 199 (D. C. Cir. 1965); *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D. C. Cir. 1977), the court was disturbed that the

10. *Standard Comparative Issue.* Under this contingent issue, the ALJ found Newmountain to be, overall, the comparatively superior applicant in this proceeding; but he did not otherwise rank the remaining applicants in comparative order. *See I. D.*, para. 87. He did find, however, that neither Newmountain nor Arizona Radio had other cognizable media interests, and he thus awarded both of these applicants "diversification" preferences over the other applicants. *Id.*, para. 83. Next, the ALJ awarded both Newmountain and Greenlee a 100% quantitative credit on the "integration of ownership and management" criterion. *Id., para. 84.* These were followed by CCC with 88%; Arizona Radio with 55%; and IBS and Lee Optical with 0%. *Id.* The ALJ held, however, that Newmountain's quantitative "integration" credit (augmented by appropriate *qualitative* enhancements) was, *in toto*, superior to the "integration" proposals of its adversaries. *Id.*, para. 88. On other subsidiary comparative indicia, the ALJ awarded Newmountain, Arizona Radio, CCC, and Lee Optical slight credits for their auxiliary power proposals. *Id.*, para. 86. And, finally, he gave IBS, Greenlee, and Lee Optical very slight "comparative coverage" preferences over Newmountain and CCC, because their proposed signals would provide more listeners with their first, and second, nighttime radio services. *Id.*, para. 85. In light of these findings, the ALJ concluded that Newmountain was superior under the contingent standard comparative issue, because its "diversification" and "integration" preferences were — in his view — sufficient to outweigh Greenlee's very slight "comparative coverage" preference. *Id.*, para. 87.

11. Exceptions have been filed concerning most aspects of the ALJ's comparative analysis, but we need consider only those necessary and material to the ultimate disposition in this proceeding. 47 CFR § 1.281. We begin our review with the exceptions to the "integration" proposal of Newmountain. The record here reveals that Newmountain is a corporation consisting of five shareholders, all of whom were proposed to work in fulltime managerial positions at its potential station. CCC excepts, and contends that Newmountain is entitled to no credit for the "integration" proposal of Donald Jerome, Newmountain's 51% shareholder, and its proposed General Manager. It asserts that,

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Commission's treatment had operated to completely *exclude* competing applicants from further comparative consideration. In this case, as in *Carrigan* and *Hispanic Owners*, no applicant has been summarily excluded under Section 307(b). All applicants have been *included* and considered essentially equal in their proposed service, and compared on our standard comparative criteria.

while employed at station KTSP-TV, Phoenix, Arizona, Jerome signed an agreement precluding him from future local competition following the termination of his KSTP-TV employment. Although the record evidence onthis particular controversy is sparse, the KSTP-TV agreement does not now appear germane to this case, since it was timely modified by Jerome, with his KSTP-TV supervisor's acquiescence, to delete all pertinent references to radio stations. *See* Tr. 597. In the absence of additional and contrary evidence, the record is legally insufficient to find Jerome to be enforceably barred by the KSTP-TV agreement from participating in his proposed Glendale radio station. We, therefore, affirm the ALJ, and will credit Jerome's proposed "integration" as Newmountain's General Manager. CCC next attacks the "integration" commitment of Rosa Maria Silva,[12] a 10% shareholder, and Newmountain's proposed fulltime Manager of Women's Affairs and Programming, as well as its proposed Computer Operations Manager. CCC submits that the record is unclear as to the specifics of Ms. Silva's responsibilities; and, further, that her duties as Manager of Women's Affairs are of a nature specifically rejected as non-managerial in *Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264 (Rev. Bd. 1984). However, it seems evident from this record that Ms. Silva's duties do, in fact, contemplate some managerial responsibility, at least insofar as that portion of the station's intended programming to be targeted specifically to women. *See I. D.*, para. 54. The next relevant inquiry, and one that was expressly considered by the ALJ, is whether it is reasonable to conclude that Ms. Silva will occupy her position on a fulltime basis. On that question, the ALJ found that, in light of the particular program format proposed by the applicant, *i.e.*, — news and public affairs twenty-four hours per day, her presence in a managerial position, with responsibility for a specialized area of programming, would be reasonable on a fulltime basis. *See* Tr. 645–646. For that reason, we find CCC's strong reliance on *Minority Broadcasters of East St. Louis, supra,* to be misplaced. There, the Board found that the non-creditable position merely involved the gathering of ideas and the making of suggestions concerning a very few programs relating to youth, while the *real* managerial authority remained in the hands of a superior. *See* 99 FCC 2d at 266–267. Those fatally discrediting elements have not been shown here, and we will again affirm the ALJ's treatment of the matter.

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[12] By amendment filed July 18, 1985, Newmountain advised the Board that Ms. Silva has legally taken back her maiden name, Rosa Maria Martinez.

12. CCC next contends that the "integration" proposals of Roy Charles Track, Jr., a 25% shareholder and proposed fulltime Human Resources Manager, Manager of Public Affairs and Minority Programming, and its proposed Community Relations Manager, and of Robert D. Jerome, a 10% shareholder and proposed Chairman of the Editorial Board and Engineering Manager, are not entitled to comparative credit. CCC claims that Track's proposed roles are vague and lack specific managerial or supervisory duties. It likewise argues that Jerome's duties, at best, would require less than 20 hours per week. Based upon our own review of the evidence and testimony of record, we also will credit both of these challenged "integration" proposals. As with Ms. Silva, above, the key questions are whether the proposed duties of these principals are truly managerial, and whether the relevant principals are likely to be engaged on a fulltime occupational basis. Here we must find, from the hearing record, that CCC's arguments regarding Track and Jerome are almost entirely speculative, and run solidly against the sworn testimony in this case, testimony that is not — on its face — inherently incredible. Nor does the record contain any clear circumstantial evidence that might substantially undercut the testimonial evidence. *See, e.g., Knoxville Broadcasting Corp.*, FCC 86R-13, released March 19, 1986, at paras. 20-23. Finally, CCC asserts that Newmountain is not entitled to any "integration" credit for Erwin W. Speakman, Jr., a 4% shareholder and proposed Program Manager, because Speakman had earlier proposed to serve as a fulltime executive producer for a certain proposed Channel 16 in Ventura, California. The record shows that, in 1979, Mr. Speakman did discuss possible future employment with California Broadcast Corporation (CBC), then (and now[13]) a Ventura television applicant. Tr. 714. It seems that CBC had, in that distant past, proposed that Speakman work fulltime at their potential television station as an executive producer of programming. *See* Tr. 712-713. Speakman, however, has no ownership or other tangible interest in CBC, nor was he apparently given a binding job offer. Tr. 714. On this record, Speakman testified that he

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[13] That Ventura television licensing case is currently back before an ALJ on remand from the Board. *See California Broadcasting Corp.*, 99 FCC 2d 994 (Rev. Bd. 1984). *See also* FCC 85-236, released May 7, 1985. That action reflects a recent Commission rulemaking, allocating that Channel 16 frequency for land mobile (law enforcement use), and substituting, instead Channel 25.

recalled that, when Newmountain filed its instant application, he simply advised CBC that he was no longer interested in a possible employment position with CBC, even if CBC were ultimately granted the Ventura construction permit. Tr. 723. At this hearing, he reaffirmed under oath his sole and exclusive commitment to Newmountain. Tr. 725-726. In the absence of additional evidence to the contrary, Speakman's "integration" proposal will receive that credit awarded by the ALJ.

13. Having affirmed the ALJ's conclusion that substantial evidence of record supports Newmountain's 100% quantitative "integration" credit, we need touch on only a few other matters which, even if the remaining exceptions of the other parties were granted, would not upset that applicant's leading position. Thus, even if Newmountain and CCC both receive 100% fulltime "integration" credit, CCC's proposed signal coverage is slightly inferior to that of Newmountain. More importantly, perhaps, CCC was assessed a "diversification" demerit for its ownership of an FM station located 100 miles away from Glendale. *I. D.*, paras. 59, 83. And, even if, *arguendo*, the "diversification" demerit assessed against CCC by the ALJ were reduced to no more than slight, *see e.g., High Sierra Broadcasting, Inc.*, 95 FCC 2d 423, 432-433 (Rev. Bd. 1983) (subsequent history omitted), that modification would not tip the comparative scale in CCC's favor. *See e.g., Colorado Television, Inc.* 98 FCC 2d 513, 525 (Rev. Bd. 1984) (comparative disposition based solely on successful applicant's slight "diversification" preference), *aff'd*, FCC 85-437, released August 6, 1985, *appeal pending sub nom. Colorado Television, Inc.* v. *FCC*, No. 85-1526 (D. C. Cir. filed August 23, 1985).

14. Lee Optical, which does not propose *any* management "integration," and also owns an AM radio station (in Hawaii), argues that its proposal to provide a first nighttime aural service to 437 persons more than Newmountain, and a second nighttime service to 269 more persons, entitles it to a substantial (and decisive) comparative "coverage" preference. Citing *FBC, Inc.*, 95 FCC 2d 256 (Rev. Bd. 1983), *aff'd*, FCC 85-309, released June 14, 1985 (subsequent history omitted), Lee Optical asserts that its "coverage" preference should dispositively outweigh all other comparative factors in this case. While we do not disturb the very slight "coverage" preference awarded here to Lee Optical, we nonetheless find that advantage to be not nearly sufficient to overcome its patent comparative shortcomings. Just by way of contrast, the Board in *FBC* did award a *substantial* "coverage" preference to the applicant proposing new television service to an

underserved area with a population of 16,812, including a first, second, third, and fourth television service to 2,309, 355, 4556, and 9,592 persons, respectively, whereas the competing applicant there proposed only a third and fourth service to 138 and 282 persons, respectively. Here, Lee Optical (and IBS and Greenlee, which all propose identical signal coverage) would provide first, second, third, and fourth nighttime aural services to 1,783, 8,494, 1,877, and 624 persons, respectively, whereas Newmountain's first, second, third, and fourth nighttime aural services would be provided to 1,346, 8,225, 1,878, and 616 persons, respectively. *I. D.*, para. 5. The differences between the instant proposals, while warranting — as we have indicated — a very slight "coverage" preference, are simply insufficient to outweigh the substantial "integration" and slight "diversification" preferences Newmountain otherwise possesses over Lee Optical. *See e.g., Louisiana Super Communications*, FCC 85R-101, released December 26, 1985, at para. 23 (Rev. Bd.) ("substantial integration preference significantly outweighs . . . slight coverage preference").[14]

15. Greenlee, also credited with 100% quantitative "integration," was downgraded by a slight-to-moderate "diversification" demerit for attributable ownership interests in AM and FM broadcast stations located in Colorado. Greenlee's exceptions repeat the argument advanced by Lee Optical, *viz.*, that it should nevertheless prevail on the basis of its slightly superior signal coverage. In addition, it insists that the ALJ erred in assessing a "diversification" demerit, because its sole owner, Diane Greenlee, promised in a pre-"B" cut-off amendment to divest herself of all other broadcast and media interests upon her award of this Glendale construction permit. However, pursuant to the Commission's well-settled "diversification" policy of constructively attributing the media interests of one spouse to the other, *see Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-427 (1981); *Hugh M. McBeath*, FCC 86R-3, released January 28, 1986, we must find that Greenlee was properly assessed the "diversification" demerit, because Diane Greenlee's husband owns 45% of the two Colorado radio stations, and *he* has no pledge to divest his current ownership of those media interests. Indeed, it seems that her husband might even acquire for himself Ms. Greenlee's stock in

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[14] Further working against it, the media interests of Lee Optical's new 49% owner, B. J. Glascock, *see supra* note 1 (stations in Arizona and Texas), are now fully attributable to Lee Optical for comparative purposes. *See, e.g., Greater Wichita Telecasting, Inc.*, 95 FCC 2d 984, 985 (1984) (media interests acquired after the specified "cut-off" date are factored in to the comparative analysis).

those very Colorado radio stations, if and when they were "divested" by Mrs. Greenlee. *See* Tr. 911-912. Hence, the slight-to-moderate "diversification" demerit imposed by the ALJ accords correctly with past precedent, *see e.g., Angeles Broadcasting Network*, 96 FCC 2d 5, 10-11 (Rev. Bd. 1984) (subsequent history omitted), and that demerit more than offsets the very slight signal "coverage" advantage Greenlee has over Newmountain. *See Mark L. Wodlinger*, 101 FCC 2d 762, 773-774, (Rev. Bd. 1985) (slight diversification preference outweighs slight coverage and integration advantages) (applications for Comm'n review pending).

16. Lastly, Arizona Radio was awarded a 55% fulltime quantitative "integration" credit, *I. D.*, para. 84, but the ALJ refused that applicant such additional credit for Dorothy Herrera Sanchez, a 33% shareholder. Ms. Sanchez was proposed as Arizona Radio's fulltime "office manager" which the ALJ found not to be a cognizable management level position. The ALJ also rejected Arizona Radio's proposal of Edgar N. Bouchard, a 10% shareholder and proposed Technical Director, inasmuch as Bouchard's availability to Arizona Radio had been made expressly contingent on the outcome of a (then) pending application proceeding for a new television station at Phoenix. *Id.* Arizona Radio charges that it was error to reject both proposals: it contends that Ms. Sanchez's duties *would* include office supervision and policy making decisions; and, it asserts that the contingency in Bouchard's "integration" proposal of record has since been removed in the wake of a settlement in the conflict posed by the Phoenix television proceeding. Considering the evidence on these arguments, we find that the ALJ properly refused to award Arizona Radio credit for either Sanchez or Bouchard. As to Ms. Sanchez, the Board has consistently held that "the occupational duties typically associated with the positions of bookkeeper, office manager, and traffic manager have not been deemed managerial, and the positions themselves not accorded integration credit." *Makai Broadcasting, Inc.*, 58 RR 2d 1488, 1489 (Rev. Bd. 1985). According to Ms. Sanchez's own testimony, the only policy making decisions she would make at the station would concern "office procedures, for small policies." Tr. 391. These duties do not merit the important comparative benefit of management "integration" credit. *See Makai, supra*, 58 RR 2d at 1489 (and cases cited therein). As to Mr. Bouchard, he candidly testified here that he fully intended to work as fulltime Technical Director at the potential Phoenix television station, *if*

that application were granted, Tr. 303-304, and would work only 10 hours per week (on a contract basis) for Arizona Radio. Tr. 304. We cannot permit Arizona Radio to remove Bouchard's priority contingency, and to thereby upgrade its comparative proposal "merely because subsequent events make it possible for him to work full time at the station." *High Sierra Broadcasting, Inc., supra,* 96 FCC 2d at 431. Consequently, although Arizona Radio and Newmountain are equal on "diversification"[15], its quantitatively inferior "integration" proposal (100% vs. 55%) places it that much behind Newmountain. *See Northland Communications,* 100 FCC 2d 914, 918-919 (Rev. Bd. 1985) (100% vs. 57.1% entitled to a moderate preference) *aff'd,* FCC 86-106, released March 14, 1986 (Comm'n).

17. *Final Evaluation.* All exceptions having potential decisional significance have been considered herein by the Board. As indicated (*supra*), we have affirmed the ALJ's refusal to add site availability issues. And, we have also concluded (*supra*) that Section 307(b) is not dispositive.[16] Having in other decisional respects affirmed the ALJ's comparative findings and conclusions as set forth in the *I. D.*, the award must go to Newmountain under the standard comparative issue.

18. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed July 31, August 26, September 16, October 3, and October 4, 1985 by Lee Optical & Associated Companies Retirement & Pension Fund Trust ARE GRANTED, and the amendments ARE ACCEPTED; That the motion for leave to amend filed August 7, 1985 by Compadres Communications Corporation IS GRANTED, and the amendment IS ACCEPTED; that the motion for leave to file supplement to reply exceptions filed December 20, 1985 by Compadres Communications Corporation IS GRANTED; That the motion to dismiss the application of Arizona Family Radio, Ltd. filed August 26, 1985 by Lee Optical and Associated Companies Retirement and Pension Fund Trust IS GRANTED; That the motion to dismiss filed October 16, 1985 by Compadres Communications Corporation IS DENIED; That the motion to strike filed August 5, 1985 by Lee Optical and Associated Companies Retirement and Pension Fund IS DISMISSED, that the motion to enlarge issues filed September 30,

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[15] As noted previously, neither has any other media interests.

[16] In light of our final disposition, we need not reach CCC's exception that a reporting issue should have been added against Greenlee, or its motion filed on September 30, 1985 to add a trafficking issue against Lee Optical. Obviously, neither are here decisional.

1985 by Compadres Communications Corporation IS DENIED; and that the request for offical notice filed January 9, 1986 by Compadres Communications Corporation IS DISMISSED as moot; and

19. IT IS FURTHER ORDERED, That the application of Newmountain Broadcasting Corporation (File No. BPH-820621AK) for a construction permit for a new FM station at Glendale, Arizona IS GRANTED; that the applications of Arizona Number One Radio, Inc. (File No. BPH-820514AP), Interstate Broadcasting System (File No. BPH-820521AM), Compadres Communications Corporation (File No. BPH-820622AD), Diane M. Greenlee (File No. BPH-820623AM) and Lee Optical & Associated Companies Retirement & Pension Fund Trust (File No. BPH-820624AT) ARE DENIED; and that the application of Arizona Family Radio, Ltd. (File No. BPH-820618AP) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 85D-40

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

ARIZONA NUMBER ONE RADIO, INC. Glendale, Arizona	MM Docket No. 84-245 File No. BPH-820514AP
INTERSTATE BROADCASTING SYSTEM OF ARIZONA, INC., Glendale, Arizona	MM Docket No. 84-246 File No. BPH-820521AM
Hector P. Torres and Adib Eden, Sr. d/b/a ARIZONA FAMILY RADIO, LTD. Glendale, Arizona	MM Docket No. 84-247 File No. BPH-820618AP
NEWMOUNTAIN BROADCASTING CORPORATION Glendale, Arizona	MM Docket No. 84-248 File No. BPH-820621AK
COMPADRES COMMUNICATIONS CORPORATION Glendale, Arizona	MM Docket No. 84-249 File No. BPH-820622AD
DIANE M. GREENLEE Glendale, Arizona	MM Docket No. 84-250 File No. BPH-820623AM
LEE OPTICAL & ASSOCIATED COMPANIES RETIREMENT & PENSION FUND TRUST Peoria, Arizona	MM Docket No. 84-256 File No. BPH-820624AT

For Construction Permit for a New FM
Station

Appearances

Edward Hayes, Jr, on behalf of Arizona Number One Radio, Inc.; *Morton L. Berfield* and *Lewis I. Cohen*, on behalf of interstate Broadcasting System; *Robert S. Stone*, on behalf of Arizona Family Radio, Ltd.; *Donald C. Jerome, pro se*, on behalf of Newmountain Broadcasting Corporation; *John Borsari*, on behalf of Compadres Communications Corporation; *Harry G. Sells*, on behalf of Diane M. Greenlee; *Howard M. Liberman, Nora E. Garrole*, and *Roger P. Furey*, on behalf of Lee Optical & Associated Companies Retirement & Pension Fund Trust; and *Charles E. Dziedzic* and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: June 13, 1985; Released: June 17, 1985

Preliminary Statement

1. The Commission, by Hearing Designation Order released March 16, 1984, designated for hearing fifteen mutually exclusive applications for a new FM broadcast construction permit on Channel 278C. Eight of the applications have been dismissed, leaving the seven applicants listed in the caption. Arizona Number One Radio, Inc. (Radio), Interstate Boadcasting System of Arizona, Inc. (IBS), Arizona Family Radio, Ltd. (Family), Newmountain Broadcasting Corporation (NBC), Compadres Communications Corporation (CCC), and Diane M. Greenlee (Greenlee), propose Glendale, Arizona as their city of license. Lee Optical & Associated Companies Retirement & Pension Fund Trust (Lee) proposes Peoria, Arizona as its city of license. The presently applicable issues in the case are as follows:

> (1) To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> (2) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to

Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. Prehearing conferences were held on May 24 and September 20, 1984. An admission session was held on September 20, 1984 and testimony was taken on October 2, 3, and 4, 1984. The record was closed by *Order*, FCC 84M-4709, released November 8, 1984. Proposed findings were filed on December 3, 1984 and replies were filed on December 17, 1984.

Findings Of Fact

Section 307(b) Issue

Comparative Coverage Considerations[1]

3. None of the applicants will provide daytime service to uncommon areas presently receiving fewer than eight aural services. The applicants, with the exception of Radio and Family, will provide nighttime service to uncommon areas presently receiving fewer than five aural services.

4. The following are the total uncommon areas and population which each applicant would cover at night:

Applicant	*Area (Sq. mi.)*	*Population*
Radio	54.2	597
IBS	7,888.6	428,166
Family	1,128.9	244,139
NBC	7,593.7	427,739
CCC	7,559.6	431,386
Greenlee	7,888.6	428,166
Lee	7,888.6	428,166

5. The following is an area and population analysis of each applicant's uncommon area according to the number of other nighttime aural services available:

	Radio	
Number of Other	*Nighttime*	
Aural Services	*Area (Sq. Mi.)*	*Population*
0	0.0	0
1	0.0	0
2	0.0	0
3	0.0	0
4	0.0	0
5 or more	54.2	597

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[1] The data discussed, below, is based on Joint Exhibit 1.

IBS

Number of Other Aural Services	*Area (Sq. Mi.)*	*Nighttime Population*
0	1,144.0	1,783
1	2,793.0	8,494
2	225.0	1,877
3	114.0	624
4	60.6	401
5 or more	3,552.0	414,987

Family

Number of Other Aural Services	*Area (Sq. Mi.)*	*Nighttime Population*
0	0.0	0
1	0.0	0
2	17.3	1,194
3	11.8	62
4	12.8	62
5 or more	1,087.0	242,821

NBC

Number of Other Aural Services	*Area (Sq. Mi.)*	*Nighttime Population*
0	917.0	1,346
1	2,687.0	8,225
2	227.0	1,878
3	111.0	616
4	59.7	397
5 or more	3,592.0	415,277

CCC

Number of Other Aural Services	*Area (Sq. Mi.)*	*Nighttime Population*
0	705.0	1,022
1	2,516.0	7,879
2	229.0	1,878
3	116.0	635
4	61.6	406
5 or more	3,932.0	419,566

Greenlee

Number of Other Aural Services	*Area (Sq. Mi.)*	*Nighttime Population*
0	1,144.0	1,783
1	2,793.0	8,494
2	225.0	1,877
3	114.0	624
4	60.6	401
5 or more	3,552.0	414,987

Lee

Number of Other Aural Services	*Area (Sq. Mi.)*	*Nighttime Population*
0	1,144.0	1,783
1	2,793.0	8,494
2	225.0	1,877
3	114.0	624
4	60.6	401
5 or more	3,552.0	414,987

Community Characteristics — Glendale

6. Glendale, Arizona, located in Maricopa County,[1a] was established in 1892 and was incorporated in 1910. According to the 1980 U.S. Census the population of Glendale was 97,172 which represented a 168.2% increase from the 1970 figure of 36,228. By July, 1982, according to the U.S. Census, the population of Glendale had increased to 106,420, a 9.5% increase since 1980. The July, 1982 Census Bureau survey ranked Glendale as having the 152nd largest population of cities in the United States (IBS Ex. 1, P. 3). The Maricopa Association of Governments projects that the population of Glendale will reach 261,600 by 2015 (CCC Ex. 8, p.10).

7. Glendale's local government consists of a mayor, a city coucil of six members, and a city manager. Glendale has a police department consisting of the chief and 144 officers, and a fire department consisting of 81 fire fighters and 22 paramedics. (IBS Ex. 1, p. 3). The city of Glendale operates on an annual budget of over 50 million dollars (CCC Ex. 8).

8. Military,[2] manufacturing and agricultural employment provide a large portion of Glendale's economic base. Construction and wholesale sectors serve the metropolitan areas and a large retail trade sector serves Glendale's residential areas. Aircraft guidance equipment, cable TV communication connections, knit underwear, corrugated containers, precision metal working, aluminum and magnesium castings, electronic components and equipment, industrial and agricultural chemicals, plastic products, bicycle components, metal tanks, springs, and packaging materials are some of the products manufactured in Glendale. Railroad service is available and the Santa Fe Railroad operates a major

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[1a] Glendale is located to the west and north of Phoenix (CCC Ex. 8, p. 1).

[2] The Luke Air Force Base, which is located in the western portion of Glendale, employs 8000 people (CCC Ex. 8).

piggyback truck terminal. Glendale serves as a shipping point for produce and cotton as several produce packing houses and cotton gins are located in the area. The Glendale Municipal Airport has runway length of 2,400 ft. and is beacon lighted (IBS Ex. 1, pp. 3–4)

9. In 1981, the civilian labor force in Glendale was 27,909. Taxable sales for 1982 were in excess of $627 million. Data for 1980 reflects median family income of $23,646. There are nine banks and savings and loan companies in Glendale with a total of 14 offices (IBS Ex. 1, p. 4). As of 1980, there were 35,458 housing units in Glendale, an increase from 1970 of 228.7%. Of these housing units, 23,310 or 65.7% were owner occupied. Median home values are approximately $71,000 (IBS Ex. 1, p. 4).

10. There are in Glendale 16 public elementary schools with a faculty of 716 and a total enrollment of 6,861. There are eight public high schools with a faculty of 894 and enrollment of 14,613. There are also three private elementary schools with a faculty of 19 and an enrollment of 560. Glendale Community College has an enrollment of 13,500 and offers a curriculum leading to an Associate of Arts Degree. The American Graduate School of International Management provides training for international management careers (IBS Ex. 1, pp. 4–5).

11. Glendale has an equestrain trail, two bowling centers, two roller skating rinks, 33 parks, six swimming pools, a golf course, two indoor movie theatres with eight screens, an outdoor theatre with seven screens, and one dramatic theatre. There is a city Library and the Glendale Community College Library. There is also a senior citizens center (IBS Ex. 1, p. 5). The Glendale Festival of Arts, held annually in a downtown park, attracts entries from artists statewide and draws over 5,000 viewers and prospective buyers. The Annual Thunderbird Invitational Ballroom Race draws thousands of viewers to see more than 70 hot air balloons compete in various events. Glendale's Little Theatre group stages several plays annually and various musical and dramatic events are offered by Glendale Community College. Glendale's 4th of July celebration includes a parade and fireworks display enjoyed by thousands of people annually (IBS Ex. 1, p. 5).

12. Glendale has hospital and nursing home facilities, some 67 physicians, and 52 dentists. Water, sewage, and solid waste collection is provided by the City of Glendale (IBS Ex. 1, pp. 5–6).

13. The City of Glendale and Glendale Chamber of Commerce have initiated an economic development plan, which includes a $20,000 bonus to a site locator or broker responsible for causing a

new major manufacturing facility, business or industrial park to locate in Glendale. There is an Industrial Development Authority of the City of Glendale (IBS Ex. 1, p. 6).

14. A weekly newspaper, *The Glendale Star* is published in Glendale. Cable television is available. One FM broadcast station, KEZC, (a Class C), and one standard broadcast station, KLFF, are licensed to Glendale (IBS Ex. 1, p. 6).[2a]

Community Characteristics - Peoria

15. Peoria, Arizona is an incorporated city bordered on the east and south by the corporate limits of the city of Glendale[2b] and on the west by the unincorporated community of Sun City (NBC Ex. 1, p. 2). Peoria was founded in 1886 by four families settling there from Peoria, Illinois and was incorporated in 1954 (Lee Ex. 1, p. 1). Although still a cultivated agricultural area (cotton, alfalfa, lettuce and citrus fruits), Peoria has grown from a small farming community into a modern city. *Id.* Peoria contains a City Hall, a fire station and police headquarters, a city library, a modern community center, a Chamber of Commerce and numerous retail stores. *Id.* Over the years, Peoria has grown steadily, and pockets of unincorporated land have periodically been annexed by the city. *Id.* The land area of Peoria has grown from 3.1 square miles in 1970 to 26.5 square miles in 1980 (Lee Ex. 1, p. 2).

16. At the present time there are 72 housing subdivisions under construction or about to be started in the City of Peoria (Lee Ex. 1, p. 2). In the first six months of 1984 construction permits for 826 single-family residential units and three apartment complexes were issued by the City of Peoria (Lee Ex. 1, p. 3). The City of Peoria has zoned and approved subdivisions having housing potential for 17,000 residential units by 1985 (Lee Ex. 5, p. 8). According to data from the United States Depratment of Commerce, in 1983 there were 4,684 housing units in Peoria with a median value of $46,300 (Lee Ex. 1, p. 16). Of these units, 76.8% were owner occupied. *Id.*

17. From 1970 to 1984 the growth in Peoria's population has been as follows:

[2a] The stations are independently owned.

[2b] Glendale and Peoria are within the Phoenix Standard Metropolitan Statistical Area (SMSA) and the Phoenix urban area (CCC Ex. 9, p. 2).

YEAR	*POPULATION*
1970	4,792
1975	7,603
1980	12,251
1982	14,800
1983	18,350
1984	22,400

Id., p. 4. The Maricopa Association of Governments projects the following population for Peoria:

YEAR	*PROJECTED POPULATION*
1990	35,740
1995	51,270
2000	71,230
2010	117,160
2015	146,430

(Lee Ex. 6, p. 3). According to Peoria Vice Mayor Richard Palmer, Peoria is growing at a rate of approximately 600 new residents each month (Lee Ex. 5, p. 9). In September 1984 the City of Peoria agreed to annex the "Lake Pleasant Mobile Home Park" and this annexation alone will add 220 new housing units with an estimated population of 700 residents. *Id.*[3]

18. Taxable sales in Peoria have increased from $77,625,200 in 1979 to $156,282,500 in 1983 (Lee Ex. 1, p. 5). Economic growth is also evidence by the new housing developments that are being built and by the new Peoria Industrial Park which will provide 74 new industrial lots (Lee Ex. 1, pp. 29–30).

19. Peoria has a mayor/council/manager form of municipal government (Lee Ex. 1, p. 6). The Peoria city government also has a vice mayor, five council members, and nine service advisory boards to provide assistance. *Id.* The citizens of Peoria elect all of these officials. *Id.* A city manager is employed by the city on a full-time basis. *Id.* Peoria's fiscal budget for 1984 is $18 million. *Id.* The city has 170 employees, including a city manager, a chief of police, a fire chief, a librarian, a director of parks and

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[3] The County and City Data Book (1983) of the U. S. Department of Commerce shows the following demographic data for Peoria: Blacks and Hispanics comprise 0.8% and 27.6%, respectively, of the population of Peoria; 19.4% of the population is age 65 or over; 58.3% of the population has a high school degree; the median household income is $15,321 (Lee Ex. 1, p. 16). In Glendale, Blacks, and Hispanics comprise 2% and 12.8% of the population, respectively; 7% of the population is age 65 or over and 75.9% has a high school degree; the median household income is $18,936. *Id.*

recreation, a city engineer, a director of public works, a field operations manager, a director of purchasing and personnel, a director of administrative and community services, a finance director, a city planning director and director of building inspection. *Id.*

20. The City of Peoria maintains a full-time fire department consisting of 11 paid firefighters (to be expanded to 19 by the end of 1984) and 22 reserves (Lee Ex. 1, p. 6). A second fire station is planned for the northern section of the city. *Id.* The fire department, in addition to responding to fire calls, offers prevention services, home safety inspection and emergency medical services. *Id.*, p. 7. Over the past two years the Peoria Fire Department has averaged 104 calls per month. *Id.* The Peoria Police Department comprises a chief, a deputy chief and 26 full-time officers, plus clerical staff. *Id.* The police department is also growing, with three new officers being added in 1984. *Id.*

21. Residents of Peoria are provided water services and sewage treatment services by the City of Peoria Public Works Department, and the City of Peoria has its own solid waste collection system. *Id.* The Peoria Public Works Department's functions also include administration and engineering, vehicle maintenance, street maintenance and lighting. *Id.* The following table breaks out major expenditures within the Peoria Department of Public Works:

Water System Division	$1,781,410
Sewer System Division	$6,020,000
Solid Waste Division	$1,405,000
Vehicle Maintenance Division	$606,228
Street Maintenance Division	$802,500

Id., p. 8.

22. A 62,000 square foot medical office building is located in Peoria, with a nucleus of 90 physicians of various specialties, dental offices, pharmacy, complete X-ray facilities, pulmonary function laboratory, cardiovascular and peripheral vascular laboratory, optical centers, hearing aid center, and out-patient renal dialysis facilities. *Id.* A 5,000 square foot ophthalmology center and a 25,000 square medical building are under construction in Peoria. In addition, a life care retirement center is under construction and will provide a 120-bed skilled nursing facility in the City of Peoria. *Id.*, p. 9.

23. Peoria has at least eight churches within its city limits, including Baptist, Presbyterian, Nazarene, Catholic, Lutheran, Latter Day Saints and Pentacostal denominations. *Id.* Peoria has its own chapters of many national service organizations. Just recently a chapter of the Rotary Club was formed and a unit of the Jaycees is also in the process of being formed. *Id.* Other service organizations and social organizations include:

American Legion Manual Flores Post 85

County Meadows Lions Club

Elks Club

Hi-Noon Kiwanis Club

Peoria Boys' & Girls' Club

Peoria Chamber of Commerce

Peoria Chapter # 3468 of AARP, Inc.

Peoria Lioness Club

Peoria Lodge No. 31 F & AM

Peoria Pioneer Lions Club

Peoria Rod & Gun Club

Peoria Stockmen 4-H Club

Peoria Sunset Lions Club

Peoria Woman's Club

Peoria Back Country Trail Blazers

PSI (Professional Secretaries International)

Id., pp. 9, 10.

24. The Peoria Public Library was first opened in 1920 by the Peoria Woman's Club. *Id.*, p. 10. In 1923 it joined the Maricopa County Library System and in 1960 the Peoria Woman's Club gave the library to the City of Peoria. *Id.* The library's services include information service, materials for the blind and handicapped, reference service, interlibrary loan, local history depository, a large print collection, service to schools through visits, homebound programs, storytime for pre-schoolers and filmstrip programs for children and cable TV. *Id.*

25. Downtown Peoria is a full-service shopping area, with numerous stores and a large department store. *Id.*, p. 11. In

addition, Arrowhead Mall, in the northern part of the City, has 36 stores. *Id.* There also is a small shopping area called Del Rio Plaza. *Id.*

26. Peoria has a large, modern Community Center which recently opened and serves as a meeting place for many community activities, including Boys' & Girls' Club meetings, senior citizens activities and city council meetings. *Id.* The Center has a full range of recreational facilities for residents of Peoria. *Id.* The City also maintains six public parks, including a sports complex, six baseball fields, a municipal swimming pool and tennis courts. *Id.* Peoria has its own Baseball Little League; and runs extensive programs for its senior citizens through the Peoria Community Center, including bingo, card games, dances and lunches. *Id.* Two major annual events are Peoria Pioneer Days, held each Spring for four days, and Fiestas Patrias, celebrating Mexican Independence Day. *Id.*

27. Peoria is served by a weekly newspaper, the *Peoria Times*. *Id.* Publication is on Fridays, and circulation is 4,000. *Id.*, pp. 11–12. There are no radio or television stations, commercial or non-commercial, licensed to Peoria (Lee Ex. 1, p. 12).

Contingent Comparative Issue

Arizona Number One Radio, Inc. (Radio)

28. Radio is an Arizona Corporation with five shareholders:

Dorothy Herrera Sanchez	Director and 35% shareholder
Donald F. Jensen	President, Treasurer, Director and 29% shareholder
Denise Bentley	Director and 16% shareholder
Edgar N. Bouchard	Vice-President, Secretary Director and 10% shareholder
Leland C. Vance	Director and 10% shareholder (Radio Ex. 1)

29. None of the principals of Radio have any other media ownership. Donald F. Jensen and Edgar N. Bouchard are each 10% owners of Fiesta Television, Inc., an LPTV applicant at Mesa, Arizona. The channel applied for has been assigned full power status at Phoenix, Arizona.[3a] Edgar N. Bouchard is the 49% limited partner in Hohokam Communications Associates, an

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[3a] Fiesta's application is consequently moot.

Arizona limited partnership, which on August 8, 1984 filed an application for UHF channel 45 at Phoenix, Arizona (Radio Ex. 3; Tr. 298).

30. Ms. Sanchez proposes to settle as full-time (40 hours or more) Office Manager of the station (Radio Ex. 4, p. 1). She will not have any persons under her supervision (Tr. 368) and her only policy making decisions will involve office procedures (Tr. 391). Ms. Sanchez testified that she will "answer the phone or type, [send] statements and probably deposit money in the bank." (Tr. 369). She will also ensure that there are enough office supplies (Tr. 386).

31. Ms. Sanchez is an Hispanic female. She graduated from high school in 1958. From 1958 to 1961 she worked as a cashier at the Greyhound Bus Depot in Albuquerque, New Mexico. From 1965 to 1973 Ms. Sanchez co-owned and helped manage Dan's Paint and Body Shop in Albuquerque, and from 1973 to 1976 she worked as Office Manager of Dan's Paint and Body Shop, Mesa, Arizona. Ms. Sanchez has resided in Mesa, Arizona for the past 11 years (Radio Ex. 2-A, p. 1). She will continue to live in Mesa (Radio Ex. 4). Mesa is not within the proposed Radio service area (Tr. 547, Stipulation of Parties).

32. Donald Jensen plans to serve as full-time (40 hours or more) General Manager of the station. In that capacity, he will be responsible for the day-to-day operations of the station, as well as coordination of management and operations policies (Radio Ex. 2-C, p. 2).

33. From 1956 to 1960, Jensen attended Brigham Young University and majored in Political Science with a minor in Business Management. He has lived for 12 years in Mesa, Arizona, outside the Radio service area (Radio Ex. 2-C) (Joint Stipulation of Parties, Tr. 547). In 1957 he was a time salesman and from 1961 to 1964 he was Sales Manager of KOVO-AM-FM, Provo, Utah. From 1972 to 1977 he was a salesman and public service director of KBUZ AM/FM, Phoenix, Arizona. From 1976 to 1979 he operated Don Jensen Media Consulting, Mesa, Arizona, performing business consulting services. Since 1979 he has co-owned Western Media Brokers, Mesa, Arizona, performing media brokering and consulting services (Radio Ex. 2-C). Jensen has been active in Boy Scouts of America, National Association of Black Owned Broadcasters, Mental Health Association, Council on Alcoholism, Community Action Agency, and Juvenile Court Advisory Council (Radio Ex. 2-C, p. 2). He served on the state committee to select textbooks for the entire State of Arizona (Tr.

510). He has been a member of the Phoenix Broadcasters Association and the Arizona Broadcasters Association (Tr. 511).

34. Denise Bentley proposes to work full-time (40 hours or more) as the station's Public Service Director. She will be responsible for the development and implementation of community relations programs and policies, including development and implementation of mechanisms for ascertaining the needs of the community (Radio Ex. 2-B). Ms. Bentley testified that her duties will be to visit with community organizations to find out about events; she will attend the events and answer mail from the organizations (Tr. 436-437).

35. Ms. Bentley is a Black Female. She graduated from high school in Detroit, Michigan in 1971 and from 1971 to 1973 attended Oakland University, majoring in Computer Technology. During 1971 and 1972 she worked part-time as a clerk-typist for the Internal Revenue Service in Detroit. During the period of 1979 to 1981 she worked as an assistant manager for Bentley's Enterprises, which is engaged in retail sales. For the past 6 years she has resided in Mesa, Arizona (Radio Ex. 2-B, p. 1). She will continue to live Mesa (Radio Ex. 4). Mesa is not within the proposed service area (Joint Stipulation of Parties, Tr. 547).

36. In his direct case testimony, Edgar Bouchard proposed to serve as full-time (40 hours or more) Technical Director of the station. Bouchard stated that he would be responsible for all technical aspects of station operations, including development of programming format and technical policies for the station (Radio Ex. 4, pp. 1-2). However, Bouchard is presently a 49% limited partner in an applicant for a new television station at Phoenix, Arizona (Tr. 302-303). Consideration for his interest includes his working at that station as chief engineer (Tr. 305). If his application for the Phoenix station is granted, Bouchard intends to participate on a full-time basis in the Phoenix televisions station as Engineering Director (Tr. 303) and Assistant General Manager (Tr. 336) (Compadres Ex. 11), and work part-time on a contract basis at Radio's proposed station, probably ten hours a week (Tr. 304). Bouchard believes he could handle the technical directorship of the FM station working 10 hours a week with actual routine maintenance handled by others. Bouchard also plans to continue providing engineering consulting work to station KRFM, Show Low, Arizona (Tr. 312, 314). At the present time, Bouchard works as Chief Engineer at KNAZ-TV Flagstaff, Arizona (Radio Ex. 2-D, p. 2). The record does not indicate

whether Bouchard will terminate this employment if Radio's application is granted.

37. Bouchard graduated from Arizona University in 1955 with a BS in Electrical Engineering. During the period 1952 through 1954 he served in the United States Army and was honorably discharged. From 1954 to 1955 he was employed as an engineer by KVOA Radio in Tucson, Arizona. From 1955 to 1956 he was employed as Chief Engineer by KTUC in Tucson. From 1956 to 1959 he was employed as Chief Engineer of WGEE, Indianapolis. From 1959 to 1961 he was employed as engineer at KUAT-TV, Tucson. From 1961 to 1966 he was employed as engineer at KVOA-TV, Tuscon. From 1966 to 1981 he was employed as Chief Operator and Supervisory Engineer at KOOL Radio/TV, Inc., Phoenix. From October 1981 to present he has been Chief Engineer at KNAZ-TV, Flagstaff, Arizona. Bouchard has resided in Flagstaff, Arizona for 3 years. For the preceeding 15 years he lived in Mesa, Arizona (Radio Ex. 2-D, p. 2). Bouchard will move back to Mesa if Radio's application is granted (Radio Ex. 4, p. 2).

38. Leland C. Vance will serve as full-time Sales Manager and will be responsible for marketing all commercial time (Radio Ex. 4, p. 2). Vance graduated in 1966 with a BA Degree in Elementary Education from Arizona State University. He obtained an MA in Education from ASU in 1968 and an Ed. Spec. in Administration from ASU in 1969. From 1966 to 1979 he was employed as a teacher by Chandler, Arizona, Public Schools. Since 1974 he has owned and operated Vance Plastering, Inc., Mesa, Arizona, a plastering business. He is a member of the Chandler Education Association and is a local and district leader in the boy Scouts of America. For 20 years he has resided in Meda, Arizona, which is not in the Radio service area (Radio Ex. 2-E, Stipulation of Parties, Tr. 547). He will continue to live in Mesa, Arizona (Radio Ex. 4).

Interstate Broadcasting System Of Arizona, Inc. (IBS)

39. IBS is a corporation wholly owned by Interstate Broadcasting System, Inc. (IBSI). The shareholders of IBSI are:

Name	*Percent of Ownership*
Paul J. Toberty Financial Corp. (owned by Paul J. Tobery and Joyce K. Toberty)	82.5%
Paul J. Toberty (as an individual)	15.0%
Mr. C. B. Tillotson	2.5%

The officers and directors of IBS and IBSI are:

Paul J. Toberty	President, Director
Joyce K. Toberty	Secretary, Director
C. B. Tillotson	Treasurer, Director

In addition, Jack Kandel is Executive Vice President of IBSI (IBS Ex. 2, p. 3).

40. IBS is the licensee of standard broadcast station KRDS, Tolleson, Arizona[4] (IBS Ex. 2, p. 3). IBSI is the licensee of KYMS, an FM station licensed to Santa Ana, California. *Id.* Interstate Broadcasting System of Colorado, Inc. (IBSC), another wholly owned subsidiary of IBSI, is the licensee of standard broadcast station KLTT, Brighton, Colorado. *Id.* (Station KLTT broadcasts daytime only, with 500 watts; it has a permit to increase power to one kilowatt. *Id.*)

41. IBS does not propose to integrate any of its principals in the day-to-day management of the proposed station (IBS Ex. 2, p. 4).

Arizona Family Radio, Ltd. (Family)

42. Family is a limited partnership. Hector P. Torres is the sole general partner. Adib Eden, Jr. is the limited partner (Family Ex. 1, p. 1).

43. Neither Family nor any of its partners has any interest in any broadcast properties or any other media of mass communication (Family Ex. 1, p. 1).

44. Family does not propose to integrate any of its principals in the day-to-day management of the proposed station (Family Ex. 1, p. 1).

Newmountain Broadcasting Corporation (NBC)

45. NBC is a corporation organized under the laws of the State of Arizona. The shareholders, officers and directors of Newmountain are:

Name	*Percent of Ownership*
Donald C. Jerome Director, Vice President	51%
Roy C. Track, Jr. Director, Vice President	25%

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[4] Tolleson, Arisona is within the proposed service area of IBS' proposed FM station. KRDS(AM) is the only station licensed to Tolleson, Arizona (*Broadcasting Yearbook 1984*, page B-16).

Name	*Percent of Ownership*
Robert D. Jerome Director, Secretary	10%
Rosa Maria Silva Director, Vice President	10%
Erwin Wade Speakman, Jr. Director, Vice President	4%

(NBC Ex. 2, pp. 1-3).

46. Neither NBC nor any of its stockholders has any interest in any broadcast properties or any other media of mass communications (NBC Ex. 14, p. 1).

47. Donald Jerome proposes to serve full-time as the station's General Manager. His duties will include the overall management of station programming, business, equal employment opportunity, legal and financial affairs, physical plan and sales (NBC Ex. 2, p. 1).

48. Donald Jerome was raised in Tolleson, Arizona and currently lives in Tempe, Arizona. He has lived within the proposed service area for 37 years (NBC Ex. 4, p. 1). He does not intend to relocate to Glendale if Newmountain's application is granted. *Id.* Between 1958 and 1961, Donald Jerome worked at KASN and KAET, the radio stations of Arizona State University (NBC Ex. 7, p. 2). Since 1966, Donald Jerome has been employed by KTSP-TV in Phoenix, Arizona. *Id.* He started at KTSP as a camera operator and later became floor manager, weekend director, and director of the station's prime-time newscasts (NBC Ex. 7, p. 3). He has been in the news department since 1970. *Id.*, p. 2. His basic duties have included reseach, production and direction of documentaries, including educational documentaries, and development of the station's systems for using videotape and live reports. *Id.* Since 1978, Mr. Jerome has been Public Affairs Editor of the station and participates in the production of public affairs programs and in the ascertainment process. *Id.*, p. 3; Tr. 584.

49. Donald Jerome has served three terms on the Executive Board of the southwest's largest organization of working-level Journalists, the Arizona Press Club (475 members). This included a year as President. He has been a member of the Society of Professional Journalists (Sigma Delta Chi) for 24 years and has served on the local Chapter's Freedom Of Information Committee (NBC Ex. 7, p. 4). Donald Jerome has won more than a dozen National and local Journalism Awards Competitions for his

documentaries and public affairs programs. He is a three time winner of the National Gabriel Award and has been a finalist for the NATAS National Community Service Award (NBC Ex. 7, p. 4). In the past years he has produced almost 1800 Public Affairs programs (NBC Ex. 7, p. 3).

50. Roy Track proposes to serve as full-time Human Resources Manager, Manager of Public Affairs and Minority Programming, and Community Relations Manager at the proposed station (NBC Ex. 2, pp. 1, 2). In these capacities his duties will be to manage the recruitment, hiring, retention, training, advancement and termination of all personnel. He plans to manage the community ascertainment process and the development and production of public affairs programming and PSA systems. *Id.* He will also manage the development and production of programming for minorities and the station's community relations. *Id.* Track is currently a minority media consultant and freelance producer of Native American television programs and projects. He spends about 60 hours per week on these activities. *Id.* While working at NBC's proposed station, Track will reduce the time devoted to these activities to less than 10 hours per week. *Id.*

51. Track is a Native American (NBC Ex. 3, p. 1). He was born in and is enrolled at the Fort Peck Reservation in Montana. *Id.* Track currently resides in Phoenix, Arizona (NBC Ex. 2, p. 4) He intends to keep this residence if NBC's application is granted (NBC Ex. 41, p. 1). Track has lived within the principal city grade service area of the proposed station for 18 years. *Id.* Track was a Master of Ceremonies at the Phoenix Indian Centers Annual Banquet (NBC Ex. 6, p. 1). He was also Master of Ceremonies at the Navajo/Hopi Solidarity Meeting held in Phoenix, Arizona, and the keynote speaker in a one-afternoon Indian Education Seminar for high school counselors in Tempe, Arizona in April 1984. *Id.*; Tr. 698. Track was also one of the organizers of the National Indian Athletic Association has organized basketball tournaments in the Phoenix area. *Id.* Since 1974, Track has been a minority media consultant and freelance producer of Native American Programs and Projects (NBC Ex. 8, p. 2). His main project is a weekly half-hour program aired at a Phoenix television station. *Id.* Track also works part-time on a "need basis" as a camera operator for KTSP-TV, Phoenix, Arizona. *Id.* He currently devotes approximately 8 hours per week to KTSP-TV. Track worked full-time for KTSP-TV between 1970 and 1974. *Id.* Between 1971 and 1973, Track worked with KMCR, the Phoenix College radio station, teaching high school students radio pro-

gramming. *Id.* Between 1973 and 1974, Track produced and hosted a weekly half-hour public affairs Native American program on KASA(AM), Phoenix, Arizona. *Id.*

52. Robert Jerome proposes to serve as the station's full-time Chairman of the Editorial Board and Engineering Manager (NBC Ex. 2, p. 2). In these capacities, he will manage the development of policies and editorial programming. *Id.* He will also manage the design, purchase and installation of technical facilities and equipment. *Id.* Mr. Jerome has also indicated that he will develop technical compliance and maintenance policies and procedures and will manage the training of technical employees. *Id.*

53. Robert Jerome lives in Phoenix, Arizona (NBC Ex. 2, p. 4). He intends to continue living at his current residence if NBC's application is granted (NBC Ex. 4, p. 1). Robert Jerome has lived within the principal city grade service area of the proposed station for 37 years. *Id.* From July 1960 through October 1963, Robert Jerome was Technical Director at KPHO-TV-AM, Phoenix, Arizona. His duties were the repair, maintenance and operation of broadcast equipment (NBC Ex. 9, p. 2). From September 1959 through July 1980, Jerome worked part-time for several radio stations doing equipment repair and field strength measurements. *Id.* From September 1959 to January 1960, Jerome worked at the Bureau of Broadcasting of Arizona State University. *Id.* He was involved in the recording of programs, and in the maintenance and installation of equipment. *Id.* Jerome has held an FCC first class radiotelephone license. *Id.*

54. Rosa Silva plans to serve as the station's full-time Manager of Women's Affairs and Programming and Computer Operations Manager (NBC Ex. 2, p. 3; Tr. 644). In these capacities, she will manage the development of policies and the production of programming related to women, focusing on the problems and needs of women in the community (NBC Ex. 2, p. 1).[5] She also plans to manage the development and operation of a newsroom computer system for the station. She does not plan to do any inputing herself at the radio station. The station will hire computer operators (Tr. 652, 653).

55. Rosa Silva is an Hispanic female. She resides in Phoenix, Arizona (NBC Ex. 2, pp. 1, 4). She intends to keep her current residence if NBC's application is granted (NBC Ex. 4, p. 2). Ms. Silva has lived within the principal city grade service area of the proposed station for 21 yeras. *Id.* Ms. Silva has worked at

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[5] NBC has proposed a "continuous news" format which will consist of news and public affairs programming (NBC Ex. 4, p. 1; Tr. 672, 673).

KTSP–TV since 1974. She has been Documentary Assistant and Librarian and has done research and planning on documentaries (NBC Ex. 10, p. 2). She has worked with reporters and producers from shooting through post-production work. *Id.* Since 1981, she has been Assistant Assignment Editor for the station's local news coverage. *Id.* Ms. Silva described her duties as developing story ideas, researching story background, maintaining contacts with news sources, planning daily news coverage, reacting to news events, and assisting producers and reports in foreign language pronunications. *Id.* She is also the station's news' tape and film librarian. *Id.*

56. Edwin Speakman proposes to be the station's full-time Program Manager. He will manage all programming other than public affairs, minority, women and editorials (NBC Ex. 2, pp. 1-3). His title encompasses the title of News Director (Tr. 705, 707).

57. Erwin Speakman lives in Van Nuys, California (NBC Ex. 2, p. 4). If NBC's application is granted, he will return to live within the station's service area (NBC Ex. 4, p. 2). Speakman lived within the service area of the proposed station for 17 yeras, between 1949 and 1966. *Id.* Since 1980, Speakman has been a news editor/inside reporter for station KFWB, Los Angeles, California (NBC Ex. 11, p. 2). His duties include writing, editing, reporting and producing news for this all-news station. *Id.* Since 1980, Speakerman also has been an independent contractor to "More Music Programming," Hollywood, California, where he is involved with syndicated country music programming. *Id.* From 1966 to 1969, Speakman held several positions with a number of radio stations in the Los Angeles area (NBC Ex. 11, p. 3). In 1969, he was Program Manager and an on-air personality for KGBS/KGBS–FM and later became newswriter and newscaster for KFI. He was an on-air personality for KLAC and then served as Operations Manager for KOST/XTRA. Between 1971 and 1974, Speakman was an on-air personality, newscaster and engineer for KBVQ/KROQ and later became studio engineer for KIEV. *Id.* In 1977 and 1978, he was an on-air personality and engineer for KGBS/KTNQ. From 1959 to 1965, Speakman held several jobs at various broadcast stations where he was involved in film editing, camera operation, continuity, promotion and news writing (NBC Ex. 11, p. 4).

Compadres Communication Corporation (CCC)

58. CCC is a corporation organized under the laws of the State of Arizona. The shareholders, officers and directors of CCC are:

Name	*Percent of Ownership*
Ralph L. Borkman Director, President	42%
Gabriel T. Garcia Director, 1st Vice President	42%
Rosemary Gibson Director, 2nd Vice President	12%
Richard B. Gilbert Director, Treasurer, Secretary	4%

(CCC Ex. 1, p. 1)

59. CCC does not hold any interest in any broadcast properties or any other media of mass communications (CCC Ex. 6, p. 1). Since 1976, Ralph Borkman has been vice president, director and 10% stockholder of Chandler Communications Corporation, the licensee of FM station KMLE, Chandler, Arizona. *Id.* Prior to the B-date in this proceeding, Borkman promised to divest all his interest in Chandler Communications Corporation in the event CCC's application is granted, and such divestiture has made a condition of the grant in the *Hearing Designation Order* in this proceeding. *Id.* Since 1979, Borkman has been vice president, director and 30% stockholder of American Aircasting Corporation, licensee of FM station KQST, Sedona, Arizona. *Id.* Sedona is approximately 100 miles north of Glendale, Arizona. *Id.* Since 1979, Richard Gilbert has been secretary/treasurer, director and 10% stockholder of American Aircasting. *Id.*, p. 2. Gilbert's wife, Alma Gilbert, is president, director, general manager and 60% stockholder of American Aircasting Corporation (Tr. 882).

60. Ralph Borkman proposed to serve a minimum of 40 hours per week as the Operations Manager and Technical Director of the proposed station (CCC Ex. 2, p. 10). He will be responsible for all aspects of the station's technical operations, including supervision of personnel and other services utilized in connection therewith. *Id.* He will also assist the General Manager in the development and implementation of the station's programming format. *Id.*

61. Ralph Borkman has lived at his current residence in Phoenix, Arizona for 6 years (CCC Ex. 2, p. 5). Borkman moved to Phoenix in 1962 or early 1963. *Id.* If CCC's application is granted, Borkman will continue to live in Phoenix. *Id.* From 1967

to 1970, Borkman became involved with Maricopa County Broadcasting, Inc. on a part-time basis, participating in the planning, construction, and maintenance of KNND(FM), Mesa, Arizona (CCC Ex. 2, p. 6). Borkman has performed engineering work in connection with applications filed before the Commission. *Id.*, p. 7. From 1970 to 1978, Borkman performed part-time maintenance and repair services for broadcast station KXTC(FM), Glendale, Arizona. *Id.* He state that he did some on-air announcing at KXTC(FM). *Id.* Since May 1984, he has been Technical Director and engineering consultant to station KQST(FM), Sedona, Arizona, and he does some on-air announcing. *Id.*, p. 8; Tr. 798. Borkman has promised to resign from his current employment if CCC's application is granted. If CCC's application is granted, engineering work at KQST will be performed by others (Tr. 782, 832–833).

62. Gabriel Garcia proposes to devote a minimum of 40 hours per week as the Sales Manager of the proposed station (CCC Ex. 4, p. 4). He will be responsible for commercial time sales with duties including selling and the supervision and coordination of the sales force effort. *Id.*; Tr. 867. He will resign from his current employment if CCC's application is granted (CCC Ex. 3, p. 5).

63. Gabriel Garcia is an Hispanic male (CCC Ex. 3, p. 1). He has lived at his present residence in Phoenix, Arizona for the last 21 years. *Id.* He will continue to live in Phoenix if CCC's application is granted. *Id.*

64. Rosemary Gibson proposes to devote a minimum of 40 hours per week to her position as Office Manager of the proposed station (CCC Ex. 4, p. 6). In that capacity, she plans to be responsible for the development and implementation of office operating procedures, including the supervision of office personnel. *Id.* She stated that her duties will include bookkeeping, billing, station correspondence and interfacing with clients and the general public. *Id.* She will resign from her current employment if CCC's application is granted. *Id.*

65. Rosemary Gibson is a female. She states that she is " . . . of American Indian heritage" (CCC Ex. 4, p. 1). She was not born on an Indian reservation; her father was half Indian and her mother was not an Indian (Tr. 843). She is not enrolled in any Indian reservation (Tr. 844). She has never participated in Indian activities (Tr. 845). Ms. Gibson currently resides in Scottsdale, Arizona, *Id.*, p. 5). If CCC's application is granted, she will continue to live in Scottsdale. *Id.* She has lived in the Phoenix

metropolitan area since 1971. *Id.* In 1978-1979, for a period of about 6 months, Ms. Gibson performed reading for the blind in the Phoenix area as part of a volunteer service program of the Society for the Blind. *Id.*; Tr. 836.

66. Richard Gilbert proposes to devote at least 40 hours per week as the General Manager of CCC's proposed station. He will be responsible for the general management and day-to-day operation of the station (CCC Ex. 5, p. 1). He will also establish general station policies and ensure compliance with FCC rules and regulations. *Id.* His responsibilities will include development and implementation of the station's news, public affairs and minority oriented programming. *Id.*

67. Richard Gilbert moved to Arizona in 1946 and has maintained a residence in the service area of the proposed station for almost 40 years (CCC Ex. 5, p. 42). Gilbert presently has a residence in Phoenix and one in Sedona, Arizona (Tr. 882). Sedona is approximately 100 miles from Glendale. He will use the Phoenix residence if CCC's application is granted (Tr. 885-886). In the early 1930s, Gilbert broadcast series of weekly motion picture reviews at WQXR, New York (CCC Ex. 5, p. 7). In the late 1930s, he participated in a radio quizmaster program. *Id.*, p. 12. In 1940, Gilbert started a 15 minute musical show for a radio station where he was also featured as a vocalist. *Id.*, p. 13. In 1941, he started the "Dick Gilbert Show" and a program on Latin-American music. *Id.* He later became supervisor of all the music programs at that station and night and Sunday manager for programming (CCC Ex. 5, p. 14). In 1942, Gilbert joined another station in New York where he continued with his music shows. *Id.*, p. 16. In 1947, Gilbert took his music shows to stations KRUX and KTYL in Arizona. *Id.*, p. 25. He was a disc jockey at KTLY for 8 1/2 years. *Id.* He also conducted a music program on KTYL(FM) and had a commercial series on KTYL-TV. *Id.*, pp. 28-29. In 1956, Gilbert acquired controlling interest in the licensee of station KPOK at Scottsdale, Arizona, and from 1956 to 1958 he was the President and General Manager of the station. *Id.*, p. 30. From 1959 to 1966, Gilbert was the owner of station KYND, Tempe, Arizona. *Id.*, pp. 39-40. After 1966, he devoted much of his time to broadcast consulting. *Id.*, p. 40. From 1970 to 1978, Gilbert was President and General Manager of station KXTC. *Id.*

68. In the early 1950s, Gilbert became a charter member of the Lion's Club of Scottsdale and of the Chamber of Commerce. Id., p. 27. Around that time he was elected a member of the Board of Directors of the Phoenix Visiting Nurse Service and of the Board

of the Phoenix Community Chest. *Id.*, p. 28. For several years during the 1950s, Gilbert was the Master of Ceremonies of the Annual Fourth of July Fireworks Celebration in Tempe. *Id.*, p. 28. He was the Master of Ceremonies for a telethon to benefit Cerebral Palsy in Phoenix, and for a public tribute to Ira Hayes. *Id.*, p. 29. In 1957-1958, Gilbert joined the Board of Director of the Scottsdale Boys' Club and attended its meetings. *Id.*, p. 32. He was also elected a member of the Board of Directors of the Scottsdale Community Chest in 1957-1958 and served as a Campaign Chairman for its Annual Fund Drive. *Id.* In the early 1960s, he became a member of the Board of Directors of the Tempe Boys' Club and of the Tempe Rotary Club. *Id.*, p. 40. He later became a Board member of the Arizona Humane Society and served for 16 years. *Id.*

Diane M. Greenlee (Greenlee)

69. Diane M. Greenlee, a female and individual applicant, will be the Owner-General Manager of the FM station (Greenlee Ex. 1). Ms. Greenlee presently owns 45 percent of the common stock of Centennial Wireless, Inc., licensee of Radio Stations KADE and KBCO(FM), Boulder, Colorado. She is also Vice President, Director and Comptroller of these stations. (Greenlee Ex. 1; Tr. 895). Her husband, Robert D. Greenlee, is President and Treasurer of Centennial Wireless and owns 45% of the stock. The remaining 10% is treasury stock (Tr. 896). From April 1979 to May 1984, Ms. Greenlee was director, comptroller and 30.5% stockholder, as joint tenant with her husband, of Mountain Wireless Ltd., licensee of station KRVV, Vail, Colorado. In May 1984, Mr. and Mrs. Greenlee sold their joint interest and resigned all positions (Greenlee Ex. 1; Tr. 902–903). Ms. Greenlee is also a 35 percent stockholder, Vice President and Director of B & D Wireless Radio, Inc., an applicant for a new FM station at Fountain, Colorado. Her husband is a 15% owner and an officer of that entity (Tr. 897–898). She will dispose of all of her present broadcast interests and all after acquired interests within 30 days after the final Order granting her this FM station (see *supra*, Tr. 892, 907 and 914).[6]

70. Ms. Greenlee will devote at lease 40 hours per week to her duties as General Manager of the proposed station. As General Manager, she will have overall responsibility for the business

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[6] Ms. Greenlee's promise to divest any broadcast interests was made in an amendment filed October 20, 1982, which was prior to the B-cut-off date (Tr. 892).

affairs, broadcast operations and personnel of the station. She will employ an entire staff, including department heads, and will have supervisory control over all of them. She will have supervisory control over all aspects of all station functions and will make all policy and day-to-day decisions affecting the station's activities and operations (Greenlee Ex. 1).

71. Ms. Greenlee has had previous broadcast experience as Comptroller of Stations KADE and KBCO(FM), Boulder, Colorado, from November 1975 to date. She was also Comptroller of Station KRVV, Vail, Colorado, from November 1983 to May 31, 1984. She testified also that she had multiple jobs and in the past has served as a traffic director, public service director, and has done "practically everything else there is to do" (Tr. 895). She supervised about five people that were directly under her (Tr. 899). She has no intention of working in Fountain if her application for Glendale is awarded to her (Tr. 914, 918-919).

72. Ms. Greenlee presently resides in Boulder, Colorado, but plans to move to Glendale upon a grant of her application (Tr. 893-895). There are no impediments to her moving to Glendale (Tr. 913-914).[7] She will resign all of her present employment commitments as soon as she receives the grant (Tr. 913-914, 925).

Lee Optical & Associated Companies Retirement & Pension Fund Trust (Lee)

73. Lee is a trust organized to provide retirement and pension benefits for the employees of Lee Optical and its related companies. The trust has approximately 85 beneficiaries. Mr. Roy A. Herberger, Jr., Dean of the School of Business of Southern Methodist University, is the sole trustee of Lee and manages its assets for the benefit of the plan's participants; he is subject to generally recognized fiduciary standards and to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1103 *et seq.* The plan participants do not exercise any voting power, and can limit the trustee's discretion only if the trustee violates his fiduciary duties or the trust agreement (Lee Ex. 2).

74. Lee is the licensee of broadcast station KCCN (AM), Honolulu, Hawaii (Lee Ex. 3). Lee is an applicant for a construction permit for a new FM broadcast station at Honolulu, Hawaii. *Id.*

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[7] Her husband will remain in Boulder until the expiration of his term as a member of the Boulder City Council. Also, their 14 year old son wants to complete his junior high school in Boulder. They both will likely join Ms. Greenlee in Glendale some time in the future (Tr. 924).

75. Lee does not propose to integrate any of its principals in the day-to-day management of the proposed stations.

Auxiliary Power Proposals

76. Radio, Family, NBC, CCC[8], and Lee[8] will receive credit for their proposals to install auxiliary power.

CONCLUSIONS

Section 307(b) Issue

77. Section 307(b) of the Communications Act, 47 U.S.C. 307(b), requires the FCC to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same". Traditionally, in resolving Section 307(b) issues, the Commission seeks to determine the relative need of each applicant's proposed service area for a new reception service and the relative need of each applicant's specified community for a new transmission service. *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2605-2608 (1961). The Commission recently simplified the FM service priorities to be considered when making a Section 307(b) choice of communities as follows: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are given equal weight. Second Report and Order, *FM Channel Policies/Procedures*, 90 FCC 2d 88, 90-93 (1982), *recon. denied*, 56 RR 2d 448 (1984).

78. The first two factors are not of any decisional significance since Lee (the Peoria applicant) and all the Glendale applicants with the exception of Radio and Family propose "white" and "grey" area service.[9] However, the first local service criterion is of decisional significance. Lee is the only applicant which proposes to provide a first local transmission service to meet the needs of Peoria, while the other applicants propose to provide a third local broadcast outlet to Glendale.

79. It is well-settled that every community of appreciable size is presumed by the Commission to need at least one radio station

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[8] CCC and Lee's auxiliary power proposal (CCC Ex. 7 and Lee Ex. 4) were rejected because they were made after the B-cut off date. However, in *Metro Broadcasting, Inc.*, FCC 84R-85, released December 3, 1984, the Review Board ruled that auxiliary power proposals made after the B-cut off date are to be credited.

[9] Lee, IBS, and Greenlee propose to serve virtually identical areas and populations.

for local self-expression. *Kaldor Communications, Inc.*, 56 RR 2d 137, 140 (Rev. Bd. 1984), citing *Plainview Radio*, 15 RR 363 (1958), and *Bie Broadcasting Co.*, 48 RR 2d 471 (Rev. Bd. 1981); *Public Service Broadcasting of West Jordan, Inc.*, 55 RR 2d 1633 (Rev. Bd. 1984). In this regard, U.S. Court of Appeals for the District of Columbia Circuit has held that "local service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations." *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977). See also *Caldwell Broadcasting Corporation*, 57 RR 2d 440 (Rev. Bd. 1984). By virtue of its proposal to provide a first local outlet to Peoria, Lee is entitled to a dispositive 307(b) preference over the Glendale applicants.

80. The findings establish that Peoria qualifies as a community of appreciable size which in the past has been awarded its own local transmission facilities. See *Skipko Broadcasting, Inc.*, FCC 85R-21 (Rev. Bd. 1985) and cases cited therein. As detailed in Findings 15–27, Peoria is a separate and distinct community in need of its first local outlet. Briefly recited, Peoria has (1) its own political boundaries and local government; (2) its own fire and police departments, city library, chamber of commerce, fiscal budget, city employees and capital impovement programs; (3) local facilities for the provision of water, sewer, solid waste collection, and street maintenance services; (4) numerous civic and fraternal organizations; (5) a land area of 26.5 square miles; (6) a population of 22,400 residents with a projected population of 35,740 by 1990 and 146,430 by 2015; (7) a new industrial park and two medical buildings; (8) its own local shopping areas and a mall; (9) its own recreational and entertainment facilities; and (10) its own local newspaper.

81. The Glendale applicants argue that no Section 307(b) preference should be awarded in this proceeding because Glendale and Peoria are both part of the Phoenix metropolitan area. They contend that the proposals of all the applicants should be treated as proposals to provide regional service to the metropolitan area. The Glendale applicants cite the line of cases from *Huntington Broadcasting Co.*, 14 FCC 563 (1950), *affirmed*, 192 F.2d 33 (D.C. Cir. 1951) to *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982). The *Huntington doctrine* was also followed in two recent cases involving Class C FM *channels, Hispanic Owners,*

Inc., 57 RR 2d 695 (Rev. Bd. 1984);[10] and *Debra D. Carrigan*, 58 RR 2d 96 (Rev. Bd. 1985).

82. The arguments of the Glendale applicants are rejected. It is clear, for the reasons discussed, *supra* that this case does not fall within the purview of the *Huntington* line of cases. The fact situation which would justify application of the *Huntington* doctrine was documented in the Board's decisions in Carrigan. In Carrigan, the Board distinguished between "traditional model" and "suburbanite model" 307(b) cases. The Board stated that in the first grouping, a 307(b) preference is awarded while in the latter, exemplified by *Huntington*, no 307(b) preference is awarded. In *Carringan*, where the Board held that the *Huntington* doctrine applied, the Board determined that Paradise was a mere appendage of Las Vegas, Nevada. Here, on the other hand, the facts establish, despite its proximity to Phoenix, Arizona, that Peoria is a separate and distinct community. Using the criteria expressed in *Carrigan*, this case properly belongs in the "traditional model" category. Therefore, Lee merits a dispositive 307(b) preference.

Contingent Comparative Issue

Diversification

83. Radio, Family, NBC and its principals have no cognizable media interests. IBS receives a moderate to substantial demerit because of its ownership of a broadcast station within the proposed service area and the ownership by its parent company of stations in the neighboring states of California and Colorado. CCC receives a moderate demerit because of its principals' interests in a station in Arizona. Greenlee receives a slight to moderate demerit for the broadcast interests held by Mr. Greenlee. The media interests of one spouse are attributed to the other for purposes of the diversification criterion, *Alexander S. Klein, Jr.*, 44 RR 2d 127 (Rev. Bd. 1978). Lee receives a slight demerit for its ownership of a radio station in Hawaii.

Best Practicable Service

Integration

84. IBS, Family, and Lee do not propose to integrate any of their principals in the day-to-day operation of the station. Radio

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[10] Unlike the facts in this case, *Hispanic Owners* involved a choice between a dominant central city and a small suburban community.

receives 55% quantitative integration credit for the proposed participation of Donald F. Jensen (29%), Denise Bentley (16%) and Leland C. Vance (10%). No integration credit is given for the proposed participation of Dorothy Herrera Sanchez (33%) since she will not hold a management level position. Also, no integration credit will be given for Edgar N. Bouchard (10%) since his availability is contingent on the denial of a pending application for a TV station. Radio also receives qualitative enhancement credit for Jensen's prior broadcast experience and Ms. Bentley's minority and female status. NBC receives 100% quanlitative integration credit for the proposed participation of all of its principals in management level positions. NBC also receives qualitative enhancement credit for local residence and broadcast experience (Donald C. Jerome - 51%); minority status, broadcast experience, local residence, civic participation (Roy C. Track, Jr. - 25%); local residence, broadcast experience (Robert D. Jerome - 10%); female and minority, local residence, broadcast experience (Rosa Silva - 10%); and broadcast experience (Erwin Wade Speakman, Jr. - 4%)[10a] CCC receives 88% quantitative integration credit for the proposed participation of Ralph L. Borkman (42%), Gabriel T. Garcia (42%), and Richard B. Gilbert (4%). No integration credit is given for the proposed participation of Rosemary Gibson (12%) since she will not hold a management level position. CCC receives qualitative enhancement credit for Borkman's local residence and broadcast experience, Garcia's minority status and local residence, and Gilberts' local residence, past civic participation, and broadcast experience. Greenlee receives 100% quantitative integration credit. The challenges to Diane M. Greenlee's proposed full-time integration are based on speculation, unsupported by record evidence and are rejected. Greenlee also receives qualitative enhancement credit for Ms. Greenlee's female status, broadcast experience and proposed move to Glendale if her application is granted.

Comparative Coverage

85. IBS, NBC, CCC, Greenlee and Lee receive a substantial comparative coverage preference over Radio and Family because of their proposals to provide substantial "white" and "grey" nighttime service. IBS, Greenlee and Lee receive a very slight

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[10a] CCC also receives slight enhancement credit for Speakman's proposed move to CCC's service area.

preference over NBC and CCC since they will serve more people in the "white" and "grey" areas.

Auxiliary Power

86. Radio, Family, NBC, CCC and Lee receive slight credit for their auxiliary power proposals.

Comparative Summary

87. NBC would be the winner. It receives no diversification demerit. Both Greenlee and CCC receive demerits. Its 100% integration credit with qualitative enhancement is superior to any of the proposed integration proposals. Finally, Greenlee's very slight comparative coverage preference over NBC does not outweigh NBC's diversification and integration preferences.[11]

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Lee Optical & Associated Companies Retirement & Pension Fund Trust IS GRANTED and the application of Arizona Number One Radio, Inc., Interstate Broadcasting System of Arizona, Inc., Arizona Family Radio, Ltd., Newmountain Broadcasting Corporation, Compadres Comunications Corporation, and Diane M. Greenlee ARE DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

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[11] As noted *supra*, Lee's application will be granted because of its dispositive 307(b) preference.

[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to section 1.276(d).

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications. —*Cablesat General Corp.*

FCC 85-407

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of	
CABLESAT GENERAL CORPORATION	File Nos. 2798/2799-DSS-P/L-82; 2800-DSS-P-82
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-referenced applications of Cablesat General Corporation (Cablesat) for authority to construct and operate a new domestic satellite system in the 4/6 GHz bands.[1] Petitions to deny were filed by American Satellite Company, GTE Satellite Corporation and GTE Spacenet Corporation and Ford Aerospace Satellite Services Corporation. Com-

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[1] All applicants were provided with a final opportunity to amend their application after the Commission issued a *Notice of Proposed Rulemaking* regarding the qualifications of domestic Fixed-Satellite operators. FCC 85-238, CC Docket No. 85-135 (released May 7, 1985). Cablesat did not amend its application. Accordingly, we rely on the information in its original application filed on August 5, 1982 together with its November 18, 1983 amendment to determine its qualifications.

ments were also filed by American Satellite Company, Southern Pacific Communications Company and The Western Union Telegraph Company. For the reasons set forth below, we deny Cablesat's applications.

2. Cablesat is a newly created corporation wholly owned by Raymond A. Kassis. Cablesat estimates the cost of construction and launch of its system to be $230 million. It asserts it will be able to finance the system through an agreement with Mr. J. A. Fairburn, Security Broker/Dealers (Fairburn).

3. We agree with the commenters, however, that Cablesat has failed to demonstrate its financial qualifications.[2] Cablesat admits it does not have any funds firmly committed to construct and operate the proposed system, but merely contends that the Commission can rely on an offer from its broker to assist in arranging financing. It also argues that because Cablesat will be providing unique services, *i.e.*, religious programming, a major part of the funding will be premised upon grant. These assertions are not sufficient to satisfy the Commission's rules governing the qualifications of domestic fixed-satellite operators.[3]

4. Cablesat provides no evidence of any corporate assets or other sources of financing other than a letter from Fairburn indicating only that, should authorization be obtained, it is "confident that a funding transaction in the order of the magnitude of $250 million can be obtained," and that it would be a lead syndicator. This is precisely the type of arrangement that the Commission has found insufficient to demonstrate financial qualifications. Section 25.291(d)(2)(iii) of the Commission's rules, states that financing arrangements contingent on further performance by either party will not be considered. A letter from a financier indicating that it will assist in arranging financing once a construction permit is granted is contingent upon the success of the financier's efforts, and provides no assurance that the

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[2] Several commenters also raise other issues in opposition to Cablesat's applications. For example, ASC argues that Cablesat has not demonstrated it has any technical expertise on staff, Ford argues that it has not provided an interference study demonstrating compatibility with 2° spacing, as required by Appendix B of the *1983 Processing Order*, and Western Union contends it otherwise has not provided all required information. Because our decision to deny Cablesat's applications can rest solely on its inability to demonstrate it is financially qualified, we need not address these other issues.

[3] Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982). *See Report and Order*, CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with construction, launch and operation of their proposed systems upon grant.

necessary funds will be obtained.[4] Thus, we find that Cablesat has not satisfied the Commission's rules and its applications will be dismissed.[5]

5. Accordingly, IT IS ORDERED that the Petitions to Deny filed by American Satellite Company, GTE Satellite Corporation, and GTE Spacenet Corporation ARE GRANTED, and applications File Nos. 2798/2799-DSS-P/L-82 and 2800-DSS-P-82, filed by Cablesat General Corporation for authority to construct three satellites and to launch and operate two satellites, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[4] *See* Notice at para. 22. Moreover, this financing arrangement does not even meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g.*, West Jersey Broadcasting Co., 89 FCC 2d 478 (1978).

[5] U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

Divestiture
Divestment of Interests
Forfeiture Mitigation, Request for Denied
Reconsideration, Petition for, Denial of

Petition for reconsideration of *Memoradum Opinion and Order and Notice of Apparent Liability for Forfeiture,* 100 FCC 2d 1244, which found telephone company constructed cable television facilities in violation of section 214(a) of Communications Act and Section 63.54 of cross-ownership rules, denied. Ordered diverstiture of cable systems reaffirmed and forfeiture imposed.
—*CCI Cablevision*

FCC 85-475

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of COMARK CABLE FUND III d/b/a CCI CABLEVISION, Complainant v. NORTHWESTERN INDIANA TELEPHONE COMPANY, INC. and NORTHWEST INDIANA CATV, INC. d/b/a NORTHWESTERN INDIANA CABLEVISION, successor to RHYS MUSSMAN d/b/a NORTHWESTERN INDIANA CABLEVISION, Defendants	File No. E-84-1

MEMORANDUM OPINION AND ORDER

Adopted August 13, 1985; Released August 23, 1985

BY THE COMMISSION:

1. Before us for consideration is a petition filed on April 17, 1985, by Northwestern Indiana Telephone Company, Inc. (NITCO). NITCO seeks reconsideration of our *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, FCC 85-116, released March 18, 1985 (Order) in the above-captioned proceeding.[1] We there found that NITCO had constructed cable television distribution facilities in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana, within its telephone service area for Northwest Indiana CATV, Inc. (Northwest Cable) without prior Comission approval in violation of section 214(a) of the Communications Act (Act), 47 U.S.C. § 214(a), and Section 63.54 of our telephone/cable television cross-ownership rules, 47 C.F.R. § 63.54.[2] Among other things, NITCO was ordered to terminate all affiliations with Northwest Cable and divest all facilities prohibited by section 63.54 no later than six months from release of our Order, *i.e.*, by September 18, 1985. NITCO also was notified of its apparent liability for forfeiture in the amount of $20,000 for its willful and repeated violations of the Act and the Commission's Rules. For reasons discussed below, we are denying NITCO's petition for reconsideration.

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[1] Also before us are: an April 29, 1985 letter from NITCO's attorney; an opposition to NITCO's petition for reconsideration filed by the complainant on May 1, 1985; a reply by NITCO filed May 17, 1985; a supplement and errata to the reply and a motion for leave to file such supplement filed by NITCO on June 4, 1985; complainant's motion to strike such reply filed May 23, 1985; NITCO's opposition to the motion to strike filed June 5, 1985; and complainant's reply thereto filed June 17, 1985. *See* also n.15, *infra*.

[2] Section 214(a) provides, in pertinent part, that no carrier shall construct any interstate line without prior Commission authorization. Section 63.54 of the Rules proscribes, *inter alia*, the provision of video programming to the viewing public by any telephone company within its telephone service area, either directly, or indirectly through an affiliated company. A telephone company also may not furnish pole space or other rental arangements to an affiliated company where such arrangements would be used to provide video programming to the viewing public within the telephone company's telephone service area. Affiliation in this connection is broadly defined to include "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship." Note 1(a).

Background

2. The facts and circumstances leading to issuance of our Order are recited therein and in previous orders in this proceeding and need not be reiterated at length. The proceeding was initiated by a complaint filed October 12, 1983, by Comark Cable Fund III, d/b/a CCI Cablevision (CCI) against NITCO and Northwest Cable (Defendants) raising serious issues of anticompetitive conduct and continuing Act and Rule violations which Defendants recognized "... could lead to the imposition of substantial penalties."[3] As early as April 1984, Defendants were cautioned by our Common Carrier Bureau (Bureau) that any further construction and operation of the subject cable television systems without Commission authorization might be found to violate our cross-ownership rules, would be at NITCO's peril, and would be subject to appropriate sanctions, including divestiture. Defendants nevertheless continued to engage in such conduct and sought neither Section 214 authorizations nor waivers of our cross-ownership rules. In ordering NITCO to terminate, by September 18, 1985, all affiliations with Northwest Cable prohibited by our Rules, we also required Defendants to report, no later than April 29, 1985, their proposals to comply with our Order in this regard. Defendants also were directed to report the results of their efforts to settle CCI's damage claims.

3. In our order we found that Defendants had been involved in a number of direct and indirect relationships, each of which was and continues to be prohibited by Section 63.54 of our Rules. Such relationships included, *inter alia*:

(a) guarantees of substantial bank loans to Northwest Cable by Robert Mussman, NITCO's chairman, president and controlling stockholder;

(b) Robert Mussman's guarantee of an indemnity agreement by his son, Rhys Mussman, for Northwest Cable concerning litigation Rhys Mussman instituted against the Town of Hebron with respect to cable television in that community;

(c) NITCO's retention of Rhys Mussman on its payroll, including employee benefits, after his resignation as its Executive Vice President from January 1, 1983 through a period when he was not receiving any salary as president of Northwest Cable, but while he was active in cable management;

(d) Robert Mussman's lease of office space to Northwest Cable;

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[3] Consolidated Reply to Consolidated Opposition to Motions for Extension of Time, filed November 16, 1983, at para. 3.

(e) Robert Mussman' acceptance or acquiescence in NITCO's subleasing of his property to Northwest Cable for the site of the headend of its Hebron cable television system;

(f) agreements by which NITCO constructed and agreed to maintain cable television facilities for Northwest Cable in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana; and

(g) lease agreements by which NITCO furnished space on its poles for Northwest Cable's cable television systems in those communities.

While Defendants acknowledged these relationships, they have not sought waiver of Section 63.54 with respect to any of them.

Discussion

4. We turn initially to certain procedural issues which have arisen in this stage of the proceeding. CCI has requested that the reply to its opposition to NITCO's petition for consideration be dismissed or stricken as contrary to section 1.106(h) of our Rules, 47 C.F.R. § 1.106(h).[4] In addition to limiting the evidence which may be taken on any reconsideration, Section 405 of the Act provides that reconsiderations "shall be governed by such general rules as the Commission may establish".[5] NITCO's reply fails to

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[4] Section 1.106(h) of our rules governing petitions for reconsideration provides that:

> [p]etitioner may reply to oppositions within seven days after the last day for filing oppositions . . . . Replies shall not exceed 10 double spaced typewritten pages, and shall be limited to matters raised in the opposition.

In granting an unopposed motion by NITCO for a 4-day extension of time to reply to CCI's opposition to the subject petition for reconsideration, the Bureau also granted an incorporated request for permission to file a pleading not to exceed 20 pages in length, in lieu of the 10-page limitation specified in Section 1.106(h). Even though the number of pages ordinarily permitted in this connection was thus doubled, NITCO failed to limit its reply to 20 pages. The only justification offered in this regard was that "[u]nder the press of its pleading deadline, NITCO has inadvertently exceeded its twenty-page limitation . . . ." Reply at n.19. NITCO asks that we waive the page limitation requirement or consider the facts asserted in its reply even if the pleading itself is excluded. On the other hand, CCI requests that the reply be stricken because only certain paragraphs therein "can be considered even remotely responsive to CCI's Opposition." Motion to Strike at 3. While NITCO stated that it would not oppose a supplemental response by CCI to the extent the reply addresses matters beyond those raised in CCI's Opposition, including new arguments NITCO apparently wishes to raise in any appeal of our final decision in this matter, CCI declined such invitation. CCI indicated that it would request an opportunity to respond to the new matters raised in NITCO's reply should its motion be denied. CCI maintains that our Rules do not permit further pleading cycles and that further delay of this already lengthy proceeding would benefit NITCO whose unlawful operations are continuing to the public and CCI's detriment.

[5] 47 U.S.C. § 405.

be limited to matters raised in the opposition and raises new arguments and defenses in contravention of section 1.106(h) of our Rules. Such arguments were readily available to it earlier in this proceeding and could have been included in its petition for reconsideration. We agree with CCI that, as our review Board stated in *Industrial Business Corporation*, 40 FCC 2d 69, (1973):

> [o]rderliness, expedition and fairness in the adjudicatory process require that reasonable procedural limits be established and maintained . . . .

40 FCC 2d at 70. Nevertheless, in light of the action we have taken herein, we do not believe that CCI will be unduly prejudiced by our considering the merits of arguments NITCO may not have raised as timely as it should have done. Accordingly, while we have not granted CCI's motion to strike NITCO's reply pleading, NITCO is admonished that we expect compliance with our procedural requirements and will not tolerate any effort to unduly delay this adjudicatory proceeding.

5. In asking reconsideration of our order, NITCO takes exception to our finding that it has violated the Act and our Rules. It claims that we made incorrect findings of fact and also seeks additional factual findings, some of which would be based upon new evidence NITCO seeks to introduce into the record.

6. NITCO initially challenges our finding that CCI "held non-exclusive franchises for cable television systems in the Towns of Hebron and DeMotte, Indiana" (Order, at para. 5), alleging that CCI never held a cable franchise in either town. However, as noted by CCI, the minutes of the Hebron Town Board meeting of October 23, 1984 indicate that the Town Board approved transfer of CCI's franchise to its successor-in-interest in Hebron, First PIC Cable Television of Indiana, Inc.[6] Further, as also noted by CCI, its predecessor-in-interest in DeMotte, Telecom Services, Inc., was granted a franchise for DeMotte on the same day Northwest Cable received a similar one.[7] In any case, there is nothing in the record to indicate that, as successor-in-interest to Telecom Services, Inc., CCI did not assume all rights and privileges that company may have had with respect to the construction of cable television facilities in Hebron and DeMotte. Furthermore, even if we were to assume, *arguendo*, that CCI never had any right to engage in cable television activities in Hebron and DeMotte, that would not relieve NITCO of liability for violating the Act and our Rules. Any person has the right to file a complaint with the

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[6] *See* Petition for Reconsideration, Exh. E, at page 1.

[7] *See* Northwest Cable's Amended Answer, Exh. 11.

Commission regarding violations of the Act or our Rules without regard to whether injury has been suffered by the complainant as a result of the alleged wrongdoing.[8]

7. NITCO also challenges our finding that it had entered into oral contracts to construct cable television systems in DeMotte and Lakes of the Four Seasons prior to May 14, 1984, when written contracts were executed (Order, at para. 11 and 12). NITCO argues that, because construction of the systems did not begin until after that date, there were no oral contracts. Such conclusion is contradicted by the record. The written contracts expressly recite that "THIS AGREEMENT is made . . . to memoralize the terms of a previous oral agreement between the parties . . . ."[9] In any event, Defendants readily concede the existence of contractual relationships between their companies, at least as of May 14, 1984, pursuant to which cable television facilities were constructed within NITCO's telephone service area. It is not material to our conclusions that construction was undertaken pursuant to oral or written agreements. Such construction without prior Commission authorization was unlawful.

8. Without explaining why it could not have done so before release of our Order,[10] NITCO alleges for the first time that Northwest Cable had requested cancellation of its contract with NITCO for construction in Lakes of the Four Seasons and that

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[8] Section 208 of the Act, 47 U.S.C. § 208, provides, in pertinent part, as follows:

> *Any person* . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition . . . whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission . . . . *No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.* (emphasis added)

[9] Exhibits 1 and 2 of NITCO's Amended Answer.

[10] Section 405 of the Act, 47 U.S.C. § 405, provides, in pertinent part, as follows:

> Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission . . . believes should have been taken in the original proceeding shall be taken on any reconsideration. . . .

Section 1.106(c)(1) of our Rules, 47 C.F.R. § 1.106(c)(1), provides, in part, that a petition for reconsideration which relies on facts not previously presented to the Commission may be granted only if the petition relies on facts which relate to events which have occurred to circumstances which have changed since the last opportunity to present such matters; or the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

almost all construction in that community was performed by Illiana Underground, a construction contractor with offices in Portage, Indiana. Further, NITCO alleges that half of the Lakes of the Four Seasons community is in Lake County, Indiana outside NITCO's service area.[11] NITCO, however, failed to furnish a copy of any written contract or to disclose the terms for such construction by Illiana Underground. More significantly, Defendants do not deny that NITCO constructed at least part of that portion of the Lakes of the Four Seasons cable television facilities which lies within its telephone service area in Porter County, Indiana without having requested authority to do so pursuant to Section 214 of the Act.

9. Also for the first time, NITCO submitted evidence in its petition for reconsideration, following release of our Order, that Robert Mussman's personal guarantee to the Town of Hebron with respect to litigation involving his son's cable television operations had been withdrawn on October 23, 1984. Again NITCO offers no explanation why, in direct contravention with its representation of November 28, 1983 that "NITCO will report the result of this effort [to reexecute the indemnity agreement or otherwise assure the town without Robert Mussman's personal quarantee] to the Commission promptly upon further action being taken",[12] it did not furnish such information in a timely fashion. We expect more of parties in proceedings before us, and we will not routinely waive our Rules on request. In any event, even if NITCO had timely furnished such evidence before we issued our Order, our final decision would not have been different. Robert Mussman's guarantee was merely one of a multitude of relevant factors. Other relationships prohibited under Section 63.54 of our Rules included, *inter alia*, permitting the sublease of his property by NITCO for use as the headend site of his son's Hebron cable television system,[13] his guarantee of several bank loans to

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[11] NITCO argues that no Section 214 authorization would have been required if it had performed the construction in Lake County where it does not provide telephone exchange service. While we have granted blanket Section 214 authorization to telephone common carriers to construct cable television facilities outside of their telephone service areas so that a specific request in that regard is no longer necessary, we have never held that Section 214 was inapplicable or that a specific or blanket authorization was not essential under the Act of our Rules. *See* n.31, *infra*.

[12] NITCO Answer, at para. 15.

[13] It appears that Northwest Cable's proposed microwave radio receive site in DeMotte is located directly behind NITCO's DeMotte central office on NITCO property and that the receive site for its Lakes of the Four Seasons cable system also is located within NITCO's telephone exchange area. *See* CCI's

Northwest Cable, his lease of office space to Northwest Cable, and allowing NITCO to pay substantial consulting fees to Rhys Mussman as his primary means of support.

10. NITCO objects to our having given weight to Rhys Mussman's representations to public officials by which he linked his cable television activities with his father, Robert Mussman (Order, at para. 22). NITCO maintains that "despite [such] representations, all that existed was a familial relationship [and that business] matters of the father and son were factually separate and remain separate to this date."[14] However, notwithstanding Defendants' original representations that Northwest Cable had arranged its own independent financing, the record is clear that, as early as May of 1983, and continuing until June 24, 1985, Robert Mussman guaranteed substantial bank loans to his son's cable company.[15]

11. NITCO also seeks to introduce new evidence purporting to show that Rhys Mussman's oral consulting arrangement with it was non-managerial in nature until discontinued on or about May 28, 1985; that the Hebron Town Board terminated Telecom Service, Inc.'s franchise in October of 1982; that none of NITCO's agreements with consulting contractors is in writing; that CCI had an oral agreement for rental of its office facilities in Hebron; that the special provision defining gross subscriber revenues quoted in paragraph 19 of our Order applied to any cable television franchise holder in Hebron; and that mail addressed to CCI had been placed by the Post Office in NITCO's P.O. Box 67. Even viewing all such post-decision evidence in the light most favorable to Defendants, we do not find it of decisional significance with regard to our ultimate conclusions that Defendants were and continue to be affiliated companies within the meaning of Section 63.54 of our Rules and have violated that rule and Section 214(a) of the Act.[16]

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petition to deny Northwest Cable's pending application (File No. CAR-22666-01) at para. 8.

[14] Petition for Reconsideration, at 11.

[15] *See* NITCO's Answer and Amended Answer, at para. 39 and Exh. 11, respectively; letter from David L. Nace to the Commission dated April 29, 1985; his letters of May 31, 1985 and July 1, 1985 to the Deputy Chief of the Bureau's Enforcement Division; and n.37, *infra*.

[16] NITCO maintains that it is common practice in the Hebron locality to have oral rather than written agreements and that various oral agreements between Defendants or their principals should be accorded valid legal merit. Such argument misses the point. The consulting and real property lease arrangements between the Mussmans and their companies were and continued to be unlawful — not because they were oral — but because they were and continue to be prohibited by Section 63.54 of our Rules. Similarly, the relevant consider-

12. NITCO argues generally that corporate law and cases involving broadcast station licensees are dispositive of the matter in its favor. We grant that general standards of corporate law may be relevant although NITCO has only relied on them in a general and non-specific manner. However, it is the Communications Act and the regulations promulgated thereunder which are of decisional significance in this proceeding. More particularly, the relevant and controlling criteria are telecommunication precedents under Title II of the Act involving common carriers and their obligations rather than cases under Title III of the Act involving broadcast licensees or even our broadcast/cable television cross-ownership rules.[17] Contrary to NITCO's argument, it is not necessary to find that there was common control over Defendants to find that they were and continue to be affiliated companies within the meaning of Section 63.54 of our Rules. As the note to that rule makes clear, any direct or indirect financial or business relationship between a carrier and its customer, except only the carrier-user relationship, is prohibited. Among other direct and indirect financial and business relationships between Defendants, which they have admitted, is a continuing arrangement by which NITCO subleases to Northwest Cable the headend site of the Hebron cable system. This relationship as well as other financial, technical and personal relationships mentioned in paras. 3 and 9, above, rendered Defendants affiliated or commonly controlled companies within the meaning of Section 63.54.[18]

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ation under Section 63.54 is not whether Rhys Mussman's duties under the consulting contract were managerial in nature. The contract itself that NITCO entered into with a person engaged in the cable TV business within its telephone service area is a relevant consideration.

[17] We have "specifically declined to impose ownership attribution standards [applicable to media] in cable/telephone cross-ownership situations." Memorandum Opinion and Order, FCC 85-252, released June 24, 1985 (modifying our attribution policy as it relates to limited partnerships), at para. 22, citing Report and Order in MM Docket No. 84-1296, FCC 85-179, released April 19, 1985. We note that, for purposes of defining control of a cable television system under our cross-ownership rules, the attribution standards have always been much more stringent for common carriers than for broadcast stations. *See* Report and Order, FCC 85-179, released April 19, 1985 (implementing the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, October 30, 1984), at para. 55, where we noted that the "attribution standards differ from common carriers and broadcast stations."

[18] Note 1(a) to Section 63.54 clearly provides that the terms "control" and "affiliate", as used therein, bar:

> any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship.

13. Further, we cannot agree with NITCO's arguments that when the business relationships between Defendants were formed, no standard had been clearly enunciated by which to judge those relationships or that we have never published a clear delineation of the parameters of our telephone/cable television cross-ownership rules. On the contrary, those rules have been clearly defined from the time when they first were promulgated more than 15 years ago.[19] While Note 1 to Section 63.54 defines affiliation quite broadly, the rules are specific and have been judicially affirmed. In our decision adopting the rules, we stressed that to fulfill its intended purpose, we would broadly interpret the concept of affiliation and that our rules would so provide.[20]

14. Furthermore, NITCO's reliance upon our recent decision in *Chesapeake and Potomac Telephone Co.*, FCC 85-48, released January 30, 1985, *recon. denied, Memorandum Opinion and Order*, FCC 85-279, released May 30, 1985 (*C&P*) is unavailing. Unlike the circumstances in the instant case, *C&P* involved no construction of cable television distribution facilities by a telephone company within its telephone service area *without prior Commission authorization*. On the contrary, in that case we granted an application, duly filed pursuant to Section 214(a) of the Act and our cross-ownership rules, which had sought certification that the public interest would be served by the construction there proposed; full opportunity was afforded all interested parties to comment on such application; the proposal was supported by the National Telecommunications and Information Administration, among others commenting; a public offering to be tariffed at the Commission was involved and, thus, a "carrier-user relationship" within the meaning of the sole exception to the broad language in Note 1(a) to Section 63.54; anticompetitive concerns of the National Cable Television Association were considered; and our

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[19] Section 214 Certificates, 21 FCC 2d 307, *recon. in part*, 22 FCC 2d 746 (1970), *aff'd sub nom.* General Telephone Co. of the Southwest v. U. S., 449 F.2d 846 (5th Cir. 1971).

[20] *Id.* at 325. Our Rules also provide for waiver of prohibited relationships upon petition on a showing of good cause. Section 63.56(a), 47 C.F.R. § 63.56(a), as amended, provides as follows:

> In those areas where the provision of video programming to the public demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause, the provisions of §§ 63.54 and 63.55 may be waived, on the Commission's own motion or on petition for waiver, if the Commission finds that the public interest, convenience and necessity would be served thereby.

Such was not the case here.

grant of the application was expressly conditioned to require separate accounting safeguards in order to prevent unlawful cross-subsidization and "provide a basis for subsequent action, should it prove necessary."[21] In contrast, the financial guarantees, lease arrangements, and other business relationships which we found existed, and some of which continue to exist, between Defendants and their principals are amply documented on the record in this case and, because they do not come within the "carrier-user" exception in Note 1(a), they render Defendants affiliated companies within the meaning of Section 63.54 of our Rules. Contrary to NITCO's conclusory assertion that it is not directly or indirectly engaged in providing video programming to the viewing public, bcause Defendants are affiliated companies, we properly disregarded their separate corporate veils and found cable television services offered by Northwest Cable to be cable operations of NITCO. Order, at para. 27.

15. Our Order properly disregarded Defendants' separate corporate entities, found them to be violating the Act and our Rules, and required them to file a report of the results of their efforts to divest the cable television systems unlawfully constructed by Rhys Mussman, Northwest Cable and NITCO and to settle CCI's damage claims.[22] Contrary to NITCO's contention that compliance with our Order can be accomplished without divestiture of Northwest Cable's cable television systems, our Order required, in the absence of the grant of waivers of Secton 63.54, divestiture no later than September 18, 1985, of all cable television distribution facilities constructed by NITCO for Rhys Mussman's company, both before and after its incorporation as Northwest Cable, without prior authorization in violation of Section 214(a) of the Act and Section 63.54 of our cross-ownership rules.[23] On the record of this proceeding, we have authority under Section 411(a) of the Act to issue orders directed against Rhys Mussman and

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[21] C&P, *supra*, at para. 20. Because *C&P* involved a proposed tariff offering comparable to traditional common carrier tariffed channel service offerings, we found the relationship there between the telephone company and its customer to be "no different from any other carrier customer relationship and, thus . . . no violation of our cross-ownership rules." *C&P, supra*, at para. 19.

[22] Order at paras. 29, 31–33, 37 and 39.

[23] Order at paras. 27 and 29. *Cf.*, Memorandum Opinion and Order, Mimeo No. 5004, released June 10, 1985 (unpublished) concerning an application by Glacier State Telephone Company for Section 214 certification and waiver of Section 63.54 in order to become affiliated with a cable television system operating within its telephone service area. Grant of a temporary waiver by the Bureau was there founded upon its understanding and expectation that the cable system to be acquired would be divested in the near future.

Northwest Cable to the same extent as we may against NITCO.[24] Contrary to Defendants' contention that Rhys Mussman may continue to own and operate the cable systems we found Defendants unlawfully constructed and continue to operate unlawfully in violation of our cross-ownership rules, the divestiture required by our Order applies not only to both Defendants (which we consider to be one entity because of their affiliation for purposes of enforcing those rules),[25] but also to Rhys Mussman as the predecessor-in-interest to Northwest Cable and its sole officer, director and shareholder.

16. Rhys Mussman enjoyed competitive advantages vis-a-vis CCI as the result of certain direct and indirect relationships between Defendants which have been established in the record. These included, *inter alia*, locating to headend site of his Hebron cable system on property subleased to him by NITCO; more favorable terms and conditions for attaching to NITCO's poles than were available to CCI; a continuing source of income from NITCO during the start-up operations of his cable company and subsequently for a lengthy period during which he received little, if any, income and no salary from his cable company; financing for his cable operations which was guaranteed by NITCO's controlling stockholder and chief executive officer, Robert Mussman; and Robert Mussman's guarantee of Northwest Cable's indemnity agreement to the Town of Hebron with respect to certain cable television litigation Rhys Mussman had initiated. Such competitive advantages occurred during a period when time was of the essence and resulted in giving Northwest Cable a

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[24] Contrary to NITCO's argument that it is merely a "connecting carrier" within the meaning of Section 3(u) of the Act and, therefore, that we do not have jurisdiction to order it to pay damages to CCI under Section 209 of the Act, NITCO is subject to, *inter alia*, Sections 208, 209, 214(a), 503(b) and 613(b) of the Act because of its construction of interstate lines for the provision of CATV service. *See*, General Telephone Co. of the Southwest v. U. S., 449 F.2d 846 (5th Cir. 1971). Order at para. 29. Furthermore, assuming *arguendo* that NITCO was merely a "connecting carrier" and thus not subject to Section 214 of the Act, NITCO would nevertheless be subject to the enforcement provisions of the Act, including Sections 208, 209 and 503(b). *Cf.* Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (6th Cir. 1962), *cert.* denied, 371 U. S. 820 (1962); Com Services v. Murraysville Telephone Co., ____ FCC 2d ____, FCC 85-25, released February, 1985, *recon. pending*; General Services Administration v. Municipality of Anchorage, Mimeo No. 5681, released July 11, 1985, at para. 17; *contra*, Comtronics v. Puerto Rico Telephone Co., 553 F.2d 701 (1st Cir. 1977).

[25] See letter to Stephen S. Trott, Assistant Attorney General, from our General Counsel, dated March 26, 1985, at para. 1 where it is stated that the Commission found that NITCO *and Northwest Cable* "had violated the agency's telephone/cable television cross-ownership rules."

headstart in constructing its DeMotte cable television system, even though DeMotte had granted cable franchises simultaneously to Northwest Cable and CCI's predecessor-in-interest. Time was also of the essence in CCI's pole attachment negotiations with NITCO in 1982, a time when Rhys Mussman was responsible for negotiating on NITCO's behalf, even though NITCO knew he had been engaged in efforts to secure cable franchises in Hebron and DeMotte as early as September 1980 and November 1980, respectively, for his own cable operations. The anticompetitive effects of this obvious conflict-of-interest, the prohibited non-tariffed relationships and arrangements between Defendants, and their failure to ever apply for the requisite Secton 214 authorization before constructing cable facilities and engaging in cable television operations in communities within which NITCO provides telephone exchange service cannot be cured ex post facto in order to allow Rhys Mussman to continue to operate the subject cable television facilities, as NITCO has proposed. Nothing less than complete divestiture of Northwest Cable's assets is mandated by our Order barring waiver of our cross-ownership rules, consideraiton of which would have to weigh the breadth and severity of the violations found in this proceeding.[26]

Forfeiture Liability of Defendants

17. We turn next to the argument that Robert Mussman and NITCO intended at all times to comply with applicable Commission requirements and that NITCO did not therefore "willfully" violate the Act or our telephone/cable television cross-ownership rules. We cannot so conclude. It long has been established that the word "willfully", as employed in Section 503(b) of the Act, does not require a showing that Defendants knew that they were acting unlawfully; it requires only a showing that they knew they were doing the acts in question — in short that the acts were not accidental.[27] While NITCO seeks to characterize its violations as

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[26] *Cf.*, Ashtabula Cable TV, Inc., 17 FCC 2d 113, 115, *recon. denied*, 18 FCC 2d 193 (1969). The instant case is distinguishable from Eagle Telecommunications, Inc., FCC 85-362, released July 19, 1985. There, in light of recent amendments to the Act contained in the Cable Communications Policy Act of 1984, we rescinded an ordered divestiture of a cable system constructed in a sparsely-populated rural area in violation of our then extant cross-ownership rules. Unlike that case, the cable systems here involved were constructed and unlawfully operated in urban or otherwise densely-populated parts of NITCO's service area and, thus, are unaffected by the 1984 amendments.

[27] Midwest Radio-Television, Inc., 45 FCC 1137, 1141 (1963); *see also* cases therein cited, including Didriksen v. FCC, 254 F.2d 354, 356 (1958).

not purposeful and at most technical, the circumstances under which the violations occurred nullify any claim that they were due to anything less than a flagrant disregard for compliance with our cross-ownership rules. NITCO does not contend that it was unaware of those rules. On the contrary, both Defendants independently confirmed that they were "knowledgeable" of the rules before any cable television facilities were constructed by NITCO within its service area.[28] Further, as we found in paragraph 24 of our Order, Rhys Mussman was advised to look into our cross-ownership rules as early as April, 1982, well in advance of his commencing cable television operations in Hebron, DeMotte, and Lakes of the Four Seasons. The violations could, and indeed should have been easily avoided. Certainly, the filing of CCI's complaint placed Defendants on notice that they could be violating our Rules; and there should not have been any question that was a real possibility after Defendants received our staff's warning, cited at footnote 37 of our Order, that further construction and operation of cable television facilities within NITCO's telephone service area without prior Commission authorization could lead to substantial sanctions, including divestiture. Defendants nevertheless elected to proceed without ever having applied for authorization pursuant to Section 214(a) of the Act and waiver of our cross-ownership rules.

18. NITCO maintains that any involvement by Robert Mussman with Northwest Cable, such as his personal guarantee for repayment of Northwest Cable's loans, was "for the benefit of Rhys as his son" rather than to protect a business interest of NITCO or himself in Northwest Cable. We cannot conclude, however, that Robert Mussman and NITCO had no interest in what cable television operator or operators sought to construct wideband telecommunication transmission facilities within its telephone service area.[29] If there was to be only one successful cable operator in these communities, Robert Mussman had every incentive to assure that it would be his son, rather than CCI. It was because of telephone companies' monopoly power over essential pole facilities and our desire to preclude anticompetitive

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[28] NITCO and Northwest Cable Answers, at 2.

[29] As noted by CCI, NITCO placed its Executive Vice President, Rhys Mussman, in charge of conducting pole attachment negotiations with CCI with full knowledge that he was planning to commence competing cable operations in the near future. Opposition to petition for reconsideration, at para. 16 The impropriety of placing Rhys Mussman in such an apparent conflict-of-interest position belies NITCO's professed willingness to negotiate fair pole attachment agreements with CCI and NITCO's professed esteem for the governmental process.

abuses of such monopoly power that we adopted our cross-ownership rules. Order, at para. 23.

19. We have determined that even if we made additional findings of fact that NITCO has requested, it nevertheless has failed to show that our findings and conclusions that it has violated the Act and our Rules are incorrect. We have found that Defendants were and continue to be affiliated companies within the meaning of Section 63.54 of our Rules and that they have operated and continue to operate in violation of that rule. We further found such conduct by Defendants to constitute not only willful but also repeated violations of our Rules.[30] Further, we found that NITCO willfully and repeatedly violated Section 214(a) of the Act by constructing distribution lines for cable television systems in Hebron, DeMotte, and Lakes of the Four Seasons, Indiana.[31] NITCO's unlawful furnishing of pole space and other rental arrangements in those communities in violation of our cross-ownership rules is continuing and began more than a year before issuance of the notice of apparent liability in our Order. Because a $2000 forfeiture penalty may be assessed for each violation and each day constitutes a separate violation, the maximum $20,000 penalty provided for under our Rules properly could be and was imposed.[32] We now will address NITCO's

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[30] *See* Section 1.80(b)(2) of our Rules and Midwest Radio-Television Inc., *supra*, at 1142.

[31] NITCO contends that Section 214 does not encompass its construction of facilities on behalf of another entity when no ownership or control over interstate lines of communication is involved. However, both the statutory language and *C&P*, a case relied upon by NITCO, indicate precisely the contrary. *See C&P, supra*, at paras. 15-16. Section 214(a) provides, in pertinent part:

> No carrier shall undertake construction of a new line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require [such] construction . . .

See also Section 214 Authorization, 98 FCC 2d 355, 356 (1984) at notes 3 and 4; National Cable Television Association, Inc. v. FCC, 747 F.2d 1503 (D. C. Cir. 1984); the legislative history underlying the Cable Communications Policy Act of 1984, H. Rep. No. 98-934, 98th Cong. 2d Sess. *reprinted in* [1984] U. S. Code Cong. & Ad. News 4655, at 4693-94; and Eagle Telecommunications, Inc., *supra*, at n.5.

[32] NITCO correctly notes that no forfeiture penalty may be imposed on it under Section 503 of the Act for violations which occurred more than a year before the notice of apparent liability in our Order. NITCO argues, for example, that, because construction of the Hebron cable television system was substantially complete in July of 1983, violations of Section 214 in that regard cannot be considered. Although our Order found violations which occurred both within and beyond the one-year statutory limitation specified in Section 503(b) (6) (B)

arguments that mitigating circumstances warrant rescission or reduction of the $20,000 forfeiture imposed on it by our Order.

20. Our Rules provide that the following factors be taken into account in determining the amount of a forfeiture penalty:

> the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Section 1.80(b)(3). As previously discussed, we have concluded that the violations of our cross-ownership rules cited in our Order were willful, rather than inadvertent, and that they were repeated for more than two years and are continuing, rather than isolated instances. They also constitute serious rather than mere technical violations. Our rules were adopted at the urging of the Department of Justice, among others, to preclude telephone companies with monopoly power over pole facilities essential to independent cable television operations to engage in anticompetitive conduct. The nature, extent and gravity of the violations of those rules established on the record in this proceeding are unprecedented. Although NITCO argues that the $20,000 forfeiture penalty imposed is unusually large, we know of no similar violations of our telephone/cable television cross-ownership rules involving unlawful construction in urban or other densely-populated areas over the objections of a competing cable TV operator since the rules were first enacted in 1970.[33] NITCO has not alleged that it is unable to pay the forfeiture or that its payment in full would impose any financial hardship. We cannot agree with its contention that imposition of the maximum forfeiture will serve no remedial purpose. By imposing such forfeiture, we intend to serve notice that willful and repeated violations of our telephone/cable television cross-ownership rules will not be countenanced.

21. NITCO argues, in mitigation, that consideration should be given to its attempted compliance with our Rules and to its cooperation with the Bureau's inquiry in this proceeding. In this connection, we initially note that we expect all Commission licensees and others within our jurisdiction to be forthright in their dealings with the Commission.[34] Furthermore, as correctly

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of the Act, the forfeiture penalty properly may be assessed and was here imposed entirely on the basis of continuing violations occurring after March 18, 1984.

[33] *Cf.*, Eagle Telecommunications, Inc., *supra*, and cases therein cited at para. 15, involving applications covering cable television systems unlawfully constructed in sparsely populated rural areas.

[34] As we recently noted:

noted by CCI, NITCO's cooperation in this matter was not entirely voluntary. Many of the facts on which our Order was based came to light only after a lengthy demand for particulars and the amended answer the Bureau directed NITCO to file.[35] Additionally, as CCI further noted, even though on November 28, 1983 Defendants represented that they would undertake efforts to have Robert Mussman's personal guarantee of an indemnification agreement from Rhys Mussman to the Town of Hebron withdrawn,[36] Robert Mussman nevertheless executed new guarantees of bank loans to Northwest Cable on four separate occasions in 1984.[37] Further, these guarantees, which continued until June 24th of this year, were signed during a period when Defendants were on specific notice that business relationships such as these could well constitute violations of our cross-ownership rules. Indeed, the record, taken as a whole, supports the contrary conclusion to that argued by NITCO—that Defendants deliberately acted in contravention of our Rules over the entire period in controversy.

22. Although NITCO further argues in mitigation that the penalty forfeiture should be reduced because it has no prior record of rule violations, CCI correctly noted that, from July 1983 through September 1984, Northwest Cable operated 13 channels *without* having obtained prior Commission authorization in violation of Section 76.610(b) of our cable television aeronautical frequency use rules.[38] The stated and evident objective of those

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> The Communications Act manifests a congressional view that the FCC must have full access to relevant information, to determine whether a carrier is properly discharging its obligations under the Act. The statutory plan is not for carriers to determine what information is to be furnished and when. It is for the Commission to do so . . .
>
> The FCC is a relatively small, overburdened agency. If it does not receive full cooperation from its regulatees when it needs relevant information, it cannot discharge its statutory responsibilities. The paucity of reported cases of this nature during the 51 years of the FCC's existence reflects the industry's understanding of this, and its substantial efforts to comply cooperatively with formal and informal requests for information . . . .

By Direction of the Commission letter, FCC 85-304, released June 12, 1985, admonishing U.S. West, Incorporated for failure to provide information promptly. *See* NewsReport No. CC-25, Mimeo No.5091, dated June 12, 1985.

[35] *See* Memorandum Opinion and Order, released April 18, 1984 (unpublished).

[36] NITCO Answer at para. 15; Northwest Cable Answer at para. 16.

[37] *See* NITCO Amended Answer at Exh. 11 which includes loan documents guaranteed by Robert Mussman and dated February 24, 1984, March 20, 1984, March 30, 1984, and April 13, 1984.

[38] *See* letter to Stephen Ross from Pamela L. Gist dated October 12, 1984 (Attachment B to Opposition to Petition for Reconsideration).

rules is the preservation of the life and safety of the public; and we view violations of those rules as a matter of great concern.[39]

23. In short, we are not persuaded that NITCO has shown either any basis for reconsidering our Order or mitigating circumstances sufficient to warrant our rescinding or reducing the $20,000 forfeiture penalty for which it is liable.

Ordering Clauses

24. Accordingly, IT IS ORDERED, pursuant to Sections 405 and 503(b) of the Communications Act, 47 U.S.C. §§ 405 and 503(b), and Sections 1.80 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.80 and 1.106, That the Petition for Reconsideration of Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, filed by Northwestern Indiana Telephone Company, Inc., on April 17, 1985, IS DENIED.

25. IT IS FURTHER ORDERED, That Northwestern Indiana Telephone Company, Inc. FORFEIT to the United States Government the sum of twenty thousand dollars ($20,000) in the manner provided for in Section 1.80(h) of our Rules within thirty (30) days from the release of this Order.

26. IT IS FURTHER ORDERED, That Northwestern Indiana Telephone Company, Inc. shall book such forfeiture to account 370, "Extraordinary income charges".

27. IT IS FURTHER ORDERED, That CCI's motion to strike IS DENIED.

28. IT IS FURTHER ORDERED, That the motion for leave to file a supplement to its reply, filed by NITCO on June 4, 1985, IS GRANTED.

29. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, shall send a copy of this Memorandum Opinion and Order by certified mail, return receipt requested, to Defendants' counsel, David L. Nace, Esq., Lukas, McGowan, Nace & Gutierrez, 1090 Vermont Avenue, N. W., Suite 650, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[39] Comcast Cablevision Corporation, 86 FCC 2d 707 (1981); Frequency Channelling Plan-CATV, 85 FCC 2d 397 (1981); *see also* Amendment of Part 76, 99 FCC 2d 512, 519, 534 (1984); *see also* Amendment of Part 76, 99 FCC 2d 512, 519, 534 (1984).

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications. —*Columbia Communications Corp.*

FCC 85-408

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of	
COLUMBIA COMMUNICATIONS, INC.	File Nos. 932/933-DSS-P/L-84
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of Columbia Communications, Inc. (Columbia) for authority to construct, launch and operate two hybrid domestic satellites operating in the 4/6 GHz and 12/14 GHz bands.[1] Petitions to deny were filed by GTE Satellite Corporation (GSAT), GTE Spacenet Corporation (Spacenet), American Satellite Company (ASC), Martin Marietta Communications Systems, Inc. (Martin

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[1] All applicants were provided with a final opportunity to amend their applications after the Commission issued a *Notice of Proposed Rulemaking* regarding the qualifications of domestic Fixed-Satellite operators. FCC 85-238, CC Docket No. 85-135 (released May 7, 1985). Columbia did not amend its application. Accordingly, we rely on the information in its November 7, 1983 application to determine its qualifications.

Marietta), National Exchange, Inc. (NEX) and Ford Aerospace Satellite Services Corporation (Ford). Comments were filed by Satellite Business Systems (SBS) and the Western Union Telegraph Company (Western Union).[2] For the reasons set forth below, we deny Columbia's applications.

2. Columbia is a newly formed corporation wholly owned by Columbia Astronautics Corporation. Clifford Laughton is the only director, holds all offices, and owns 100 percent of the outstanding stock of Columbia Astronautics Corporation. Columbia estimates the cost of construction and launch of its system to be $250 million. It asserts that it will finance the system through a public offering of 96 separate limited partnerships created to purchase one transponder each. Each transponder will be sold for $4.8 million, yielding Columbia $414.7 million after brokerage commissions.[3]

3. We agree with the petitioners that Columbia has failed to demonstrate its financial qualifications.[4] Columbia does not have any committed funds, and provides no information as to even potential relationships with financial institutions. Columbia asserts simply that its system will successfully yield the required $4.8 million per transponder. These assertions are not sufficient to satisfy our rules governing the qualifications of domestic fixed-satellite operators.[5]

4. Aside from a $500,000 payment from its parent company, for which no evidence of the parent's ability to make this payment is provided, Columbia has provided no other evidence of assets, income or debt financing. Instead, it relies on a marketing plan by which it will publicly offer limited partnerships in the 96 transponders on its proposed system. This is precisely the type of

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[2] Martin Marietta also filed a Motion to Dismiss.

[3] Columbia also indicates that pre-operating expenses of $500,000 will be provided by its parent company.

[4] Several commenters also raise other issues in opposition to Columbia's applications. For example, they argue that Columbia has not provided any evidence of technical expertise on staff, has failed to show the system is technically viable, has violated Section 319(d) of the Communications Act by executing a Memorandum of Understanding with Hughes to construct satellites, and has not provided much of the information required by Appendix B of the *1983 Processing Order*. Because our decision to deny Columbia's applications can rest solely on its inability to demonstrate it is financially qualified, we need not address these other issues.

[5] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Statellite Service, 90 FCC 2d 1 (1982).

arrangement that we have found insufficient to demonstrate financial qualifications. Section 25.391(d)(2)(iii) of our rules, 47 C.F.R. § 25.391(d)(2)(iii), states that financing arrangements contingent on further performance by either party will not be considered. The fact that Columbia has a marketing plan for its transponders provides no assurance that its efforts will be successful or that the necessary funds will be obtained.[6] Thus, Columbia has not satisfied our requirements, and its applications will be dismissed.[7]

5. Accordingly, IT IS ORDERED that the Petitions to Deny filed by American Satellite Company, GTE Satellite Corporation, GTE Spacenet Corporation, Martin Marietta Communications Systems, Inc. and National Exchange, Inc. ARE GRANTED, and the applications of Columbia Communications Corporation, File Nos. 932/933-DSS-P/L-84, to construct and launch two hybrid domestic fixed-satellites, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[6] *See* Notice at Para. 22. Moreover, the financial arrangement does not even meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g.*, West Jersey Broadcasting Co., 89 FCC 2d 478 (1978).

[7] U.S. v. Storer Broadcasting, 351 U.S. 192 (1956).

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—*Comsat General Corp.*

FCC 85-409

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of

COMSAT General Corporation

For Authority to Construct, Launch and
Operate Space Stations in the domestic
Fixed-Satellite Service

File Nos.
934/935/936-DSS-P/LA-84

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. Before the Commission are the above-captioned applications of COMSAT General Corporation (COMSAT General) for authority to construct, launch and operate three domestic fixed-satellites in the 12/14 GHz bands. Ford Aerospace Corporation (Ford) has petitioned to deny the applications. For the reasons set forth below, we deny the petition and grant the three applications.

2. COMSAT General is a wholly-owned subsidiary of the Communications Satellite Corporation (Comsat). Its proposed satellites will each carry 16 transponders, with each transponder having a bandwidth of 54 MHz and a nominal transmitter output power of 40 watts. Two orbital locations are requested at 93° W. L. and 101° W. L., with two of the three in-orbit satellites

colocated at 101° to provide in-orbit spare capability. Three switchable coverage patterns are proposed: full continguous states coverage, and eastern United States regional coverage, and a western United States regional coverage. Services are proposed to be offered either on a common carrier or a noncommon carrier basis.[1]

3. COMSAT General has an estimated funding requirement of $244 million to construct, launch and operate these satellites. It has demonstrated current assets of $271 million, and a $150 million line of credit with eight banks.

4. Ford Aerospace has petitioned to deny the applications on the basis that COMSAT General is not a "new entrant" for purposes of these proceedings. It claims that Comsat's one-third ownership interest in Satellite Business Systems (SBS) gives COMSAT General an existing substantial involvement in 12/14 GHz band satellite operations.[2] It is not necessary for us to resolve the merits of this contention, for we note that Comsat has subsequently divested its interest in SBS.[3] For this reason, the petition of Ford Aerospace is moot, and will be denied.

5. We have adopted rules governing the financial qualifications of domestic fixed-satellite operators.[4] An analysis of the instant applications under these rules reveals that COMSAT General has demonstrated its financial qualifications. The financial information submitted shows current assets of $271 million, in addition to a $150 million line of credit; this financial basis far exceeds the estimated $244 million required to construct, launch and operate the three satellites.

6. We have reviewed the applications in their entirety, as well as the comments submitted by other parties. Based upon this review, and upon the analysis discussed in the previous paragraph, we conclude that COMSAT General is legally, technically, financially and otherwise qualified to construct, launch and

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[1] Because Comsat has not provided all information required by Domestic Fixed-Satellite Service: Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D. C. Cir. 1984), it must be prepared to provide service only on a common carrier service until the appropriate transponder sales authority is applied for and granted. *See* Rainbow Satellite, Inc., 94 FCC 2d 437 (1983).

[2] Petition of Ford Aerospace at 50–52.

[3] *See* Satellite Business Systems, FCC 84-589 (released November 28, 1984).

[4] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules have codified the traditional Commission policy requiring all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982).

operate these satellites, and that a grant of these applications would be in the public interest.

7. Accordingly, IT IS ORDERED that Application File Nos. 934/935/936-DDS-P/LA-84 ARE GRANTED, and that COMSAT General Corp. IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions, and technical specifications set forth in its applications.

8. IT IS FURTHER ORDERED that COMSAT General IS AUTHORIZED to launch and operate three space stations in the doemstic fixed-satellite service, in accordance with the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985).

9. IT IS FURTHER ORDERED that COMSAT General SHALL COMPLY with all requirements of the *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985), as well as the terms and conditions of all other previous orders and authorizations.

10. IT IS FURTHER ORDERED that unless extended by the Commission for good cuase shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

	Construction Commenced	*Construction Completed*	*Launch no later than*
COMSAT # 1	July, 1986	July, 1989	October, 1989
COMSAT # 2	July, 1986	October, 1989	February, 1990
COMSAT # 3	July, 1986	January, 1990	July, 1990

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to COMSAT General is subject to change by summary order of the Commission on 30 days notice, and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered, *inter alia*, to implement any of the objectives or policies set forth in the *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or in the *1985 Orbit Assignment Order*, FCC 85-396. Neither this authorization nor any right granted by this authorization shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or be transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the

public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the petition to deny of Ford Aerospace IS DENIED.

13. COMSAT General is afforded thirty days from the date of the release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appeal, Denied
Condition on Grant, ALJ-imposed, Inmaterial and Harmless

Review Board denied appeal from ALJ's order which, though approving a settlement agreement and merger, conditoned grant of the application upon initiation of service within one year. Because MDS rules, 47 CFR Sec. 21.43, specifies an eight-month construction period, and parties have not stated a basis for anticipating an inability to comply, the ALJ's condition was inmaterial and harmless.

— *Digital Paging Systems, Inc.*
CC Docket No. 85-279

FCC 86R-14

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	CC Docket No. 85-279
DIGITAL PAGING SYSTEMS, INC.	File No. 50079-CM-P-74
and	
MIDWEST CORPORATION	File No. 50024-CM-P-75
and	
VIDEOHIO, INC.	File No. 50032-CM-P-75
For Construction Permits in the Multipoint Distribution Service for a new station on Channel 2 at Detroit, Michigan.	
and	

PRIVATE NETWORKS, INC.	File No. 50182-CM-P-74
and	
MULTIPOINT INFORMATION SYSTEMS, INC.	File No. 50035-CM-P-75
For Construction Permits in the Multipoint Distribution Service on Channel 2 at Pontiac, Michigan.	
and	
GREATER MEDIA, INC.	File No. 50046-CM-P-75
For Construction Permits in the Multipoint Distribution Service for a new station on Channel 2, at Royal Oak, Michigan.	

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1986; Released: March 21, 1986

BY THE REVIEW BOARD:

1. The Review Board has under consideration the Appeal of Condition on Application filed February 10, 1986 by Detroit MDS Company. By *Memorandum Opinion and Order* (*MO&O*), FCC 86M-080, released January 9, 1986, presiding Administrative Law Judge (ALJ) Edward J. Kuhlmann approved a settlement agreement pursuant to which Digital Paging Systems, Inc., Midwest Corporation, private Networks, Inc., Multipoint Information Systems, Inc., and Greater Media, Inc. will form a joint venture, named Detroit MDS Company (Detroit MDS), to operate MDS Channel 2 in Detroit.[1] In his *MO&O*, the ALJ granted the Detroit MDS application subject to the condition that "the parties meet

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[1] The application of Videohio, Inc. was dismissed as part of the settlement.

their agreement to initiate service within one year."[2] FCC 86M-080, *supra.* In its appeal, Detroit MDS seeks deletion of this condition and states that the Common Carrier Bureau, which is the only other remaining party to this proceeding, has indicated that it has no objection to the requested relief.[3] We deny the appeal.

2. In his *MO&O*, the ALJ found that "[a]s a condition for approval of the agreement the parties have stated that they will initiate service in less than a year's time"; therefore, he formally imposed the one-year initiation of service condition upon the grant of the application. Detroit MDS maintains that the ALJ acted upon a "mistaken and unsupported belief," *Appeal* at 1, because "*[n]owhere* in the settlement documents or in the record did the applicants . . . make such a promise" of early initiation of service, *id.* at 2 (emphasis in original). At the same time, it concedes (*id.* at n.*) that:

> The applicants' Joint Petition did note that "With the approval of these agreements; the dismissal of the [Videohio] application; and the granting of the construction permit to Detroit MDS Company, Channel 2 MDS service will become available to the public within a matter of months rather than years." Jt. Petition at page 1-2.

However, it immediately follows this concession with a disclaimer that it made no actual "'promise' to initiate service in a few months." *Id.*

3. In addition to claiming mistake of fact as a basis for its appeal, Detroit MDS states that the condition "needlessly ties the hands of both the permitee and the Common Carrier Bureau." Specifically, it notes that the Bureau normally allows an MDS permittee eight months to construct pursuant to 47 CFR § 21.43 and, upon expiration of such period, may grant a properly-filed application for extension of time to construct. Appeal at 2-3. Appellant asserts that under the terms of the ALJ's one-year condition, "it is clear . . . whether the . . . Bureau could remove the condition" and grant an extension of time beyond the one-year

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[2] The ALJ also conditioned the grant on the outcome of the hearing designated in *A.S.D. Answering Service, Inc.*, FCC 82-391, released August 24, 1982, because Digital Paging Systems' qualifications to be a licensee are at issue in that proceeding. This condition is not a subject of the instant appeal.

[3] In addition, Detroit MDS requests that we waive the 47 CFR § 1.302(b) requirement that a notice of appeal be filed within 10 days after release of the *MO&O*, *supra*, which terminated the proceeding, and accept its appeal. It claims that the time lapse between release of the *MO&O* and its receipt by the five joint venturers, coupled with their need to coordinate a decision, made compliance impossible. We hereby grant this unopposed waiver request and accept the appeal.

time limit imposed by the condition. *Id.* at 3. Nevertheless, it states that it "has no reason to believe that it will not have initiated service within one year. Indeed, positive steps toward that end have already been made." *Id.*

4. We will deny the appeal. The ALJ interpreted the joint petition as advancing the institution of new MDS service within a matter of "months rather than years" as one of the primary public interest benefits to be secured by approval of the settlement agreement.[4] Inasmuch as the Commission's MDS rules specifically require construction of the facility within eight months, we fail to see how the ALJ's condition affects the settlement agreement, unless the parties have some unstated basis for anticipating an inability to comply with the construction period rules. Absent such an anticipatory inability to construct the facility within the period specified by law, we find the ALJ's condition here to be immaterial and harmless. Accordingly, we find no public interest basis to intervene in this matter.[5]

5. ACCORDINGLY, IT IS ORDERED, That the Appeal of Condition on Application filed February 10, 1986 by Detroit MDS Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[4] Indeed, Detroit MDS has confirmed this impression in its appeal where it has indicated that it has every expectation it will inaugurate service within a year and has taken steps in that direction. *See* para. 3, *supra*.

[5] Nothing said here is meant to suggest that the parties are estopped from seeking a waiver (*i.e.*, extension of time) of the construction period rules from the Common Carrier Bureau, *see* 47 CFR §§ 0.91(a), 21.11(b), should "good cause" later arise.

Satellite Domestic Communication
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service dismissed at applicant's request.

— *Digital Telesat, Inc.*

FCC 85-410

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of	
DIGITAL TELESAT, INC.	File Nos. 939-DSS-P/LA-84 940-DSS-P/LA-84 941-DSS-P/LA-84
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. By letter dated July 10, 1985, Digital Telesat, Inc. (Digisat), by its counsel, notified the Commission that it was withdrawing the above-captioned applications from Commission consideration. In its applications, Digisat requested authority to construct, launch and operate one domestic fixed-satellite in the 4/6 GHz bands and two domestic fixed-satellites in the 12/14 GHz bands.

2. Accordingly, IT IS ORDERED that the applications of Digital Telesat, Inc. to construct, launch and operate satellites in the domestic Fixed-Satellite Service, Application File Nos.

939/940/941-DSS-P/LA-84 ARE DISMISSED per applicant's request.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
— *Equatorial Communications Services*

FCC 85-411

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of	
EQUATORIAL COMMUNICATIONS SERVICES	File Nos. 942-DSS-P/LA-84 943-DSS-P/LA-84 944-DSS-P-84
For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service.	

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission has before it the above-captioned applications of Equatorial Communications Services (Equatorial) for authority to construct, launch, and operate two 4/6 GHz domestic fixed-satellites and to construct a third satellite to be used as an on-ground spare. These proposed satellites are to comprise the space station portions of the communications network known as Equastar. Equatorial amended its applications on June 7, 1985.[1]

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[1] All applicants were provided an opportunity to amend their applications after the Commission issued a Notice of Proposed Rulemaking regarding the qualifications of domestic fixed-satellite operators. FCC 85-238 CC Docket No. 85-135 (released May 7, 1985). To the extent that any of the comments on this

American Satellite Corporation (ASC) filed a petition to deny Equatorial's application.[2] For the reasons set forth below, we deny Equatorial's applications.

2. Equatorial is a wholly-owned subsidiary of Equatorial Communications Company (ESC). Equatorial's primary business is the sale of satellite communications products and services. Equatorial states that the cost of the Equastar program is $221.4 million, and that it will fund its proposed program in three phases. First, it will use internal sources to supply the first $1 million of the funds needed through the end of 1986. For this purpose Equatorial's board of directors has committed $1 million for the Equastar project. Second, Equatorial intends to raise $50 million through an equity offering at the end of 1986 and an additional $44 million at the end of 1988. Third, Equatorial intends to raise capital through debt financing, possibly combined with leveraged lease financing. The debt financing is to occur after the first equity offering, and will raise from $60 to $80 million. This debt financing will apparently take place in two steps, the first after the initial equity offering and the second after the subsequent equity offering. On July 2, 1985, Equatorial's counsel informed the Commission that Equatorial had entered into a memorandum of understandiung with Martin Marietta Corporation whereby Martin Marietta will acquire a 25 percent equity interest in Equatorial for approximately $50 million.[3]

3. We find that Equatorial has not demonstrated the requisite financing to construct and operate its proposed satellite system pursuant to Section 25.391(c) of the Commission's rules.[4] The documentation submitted to the Commission shows that Equatorial has $24.3 millon in current assets and $5.5 million operating income. Thus, in order to comply with our rule, Equatorial must demonstrate other sources of funding for the remaining $191.6 million in system costs. The evidence Equatorial relies on to make this demonstration includes equity financing, debt financing and

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supplemental information have been rendered moot by the adoption of the final rules, they will not be discussed here.

[2] ASC's petition to deny stated that action on both Equatorial applications should be deferred because the launch dates being proposed were in 1988.

[3] Letter from Cornelius J. Golden, Jr. to Secretary, Federal Communications Commission (July 2, 1985).

[4] These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with construction, launch and operation of their proposed systems upon grant. *See* Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982); *Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

its Memorandum of Understanding with Martin Marietta. None of these arrangements has gone beyond the preliminary planning steps and thus do not meet our financial qualification requirements.

4. Equatorial's Memorandum of Understanding with Martin marietta cannot be used as evidence of its financial capability because it is not a fully negotiated agreement.[5] Rather, it is merely a memorandum of understanding with no guarantee that the acquisition will be implemented.

5. To support its equity financing, Equatorial supplied two documents from investment banking firms.[6] One expresses the institution's belief that "a normal environment" would permit Equatorial to raise at least $125 million in 1986 and 1987, but that "extremely adverse market conditions or a significant performance shortfall in the Company's operating plans could affect the company's ability to obtain financing in the public markets." The other letter expresses the opinion that Equatorial could raise $120 million in 1986 and 1987 by selling common or convertible securites. To support its debt financing plans, Equatorial supplies a letter from a Bank of America vice president that reflects a belief that the debt markets will "fully support" Equatorial's financing plan and that funds will be available subject to certain enumerated terms and conditions.[7] These documents fit precisely within the category of arrangement that we have found insufficient to demonstrate financial qualifications. Our rules state that financing arrangements based upon further performance by either party will not be considered.[8] Letters from institutions indicating a belief that financing can be arranged provide no assurance that the necessary funds will be obtained.[9]

6. Thus, on the basis of the information submitted by Equatorial, we conclude that it has not demonstrated that it has satisfied our rules and policies and its applications will be denied.[10]

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[5] *See* 47 C.F.R. § 25.391(d)(2)(i), (iii).

[6] *See* letters from Steven D. Brooks, Principal, Alex. Brown & Sons, Inc. to Dean T. Mack, President, Equatorial Communications Company (June 6, 1985); Henry F. Owsley, Vice President, Goldman, Sachs & Co. to Dean T. Mack (June 6, 1985).

[7] *See* letter from Richard K. Moss, Vice President, Bank of America to Dean T. Mack, President, Equatorial Communications Company (June 6, 1985).

[8] 47 C.F.R. § 25.391(d)(2)(iii).

[9] *See Notice* at para. 22. Moreover, this financing arrangement does not even meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g.*, West Jersey Broadcasting Co., 89 FCC 2d 478 (1978).

[10] U.S. v. Storer Broadcasting, 351 U.S. 192 (1956).

7. Because we have concluded that Equatorial is not financially qualified to construct its proposed satellites, we need not reach the issues raised by ASC in its petition to deny and will dismiss that petition as being moot.

8. Accordingly, IT IS ORDERED that the application of Equatorial Communication Services, File Nos. 942/942-DSS-P/LA-84 and 944-DSS-P-84, for authority to construct, launch and operate two domestic satellites and to construct a third satellite as an on-ground IS DENIED.

9. IT IS FURTHER ORDERED that the petition to deny filed by American Satellite Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.

— *Federal Express Corp.*

FCC 85-412

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of

FEDERAL EXPRESS CORPORATION

For authority to Construct, Launch and
Operate Space Stations in the Domestic
Fixed-Satellite Service

File Nos.
945/946-DSS-P/LA-84
947-DSS-P-84

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. Before the Commission are the above-captioned applications of Federal Express Corporation (Federal Express) for authority to construct, launch and operate two domestic fixed-satellites in the 12/14 GHz band and to construct a third satellite as an on-ground spare. Federal Express filed an amendment to its applications on June 7, 1985. American Satellite Company (ASC) and Satellite Business Systems (SBS) filed comments. For the reasons discussed below, we grant Federal Express's applications.

2. Federal Express, a Delaware corporation, was incorporated in 1971 and commenced operations in 1972. It provides an overnight, door-to-door express delivery service for high priority packages and documents. Federal Express is certified as a common carrier in the Digital Electronics Message Service but it does not currently operate any facilities or provide any services as a communications common carrier. Federal Express does participate in the operation of several satellite earth stations.

3. Federal Express's proposed satellites will each carry 32 narrowband transponders, with a bandwidth of 54 MHz and a nominal transmitter output power of 1.25 watts, and 16 wideband transponders, each with a bandwidth of 110 MHz and nominal transmitter output power of 30 watts. The narrowband transponders will provide four regional coverage beams. Coverage of Alaska, Hawaii and Puerto Rico will be provided by noncontiguous portions of the east central and west central regional beams. Services are proposed to be offered on a common carrier basis. Federal Express expects to launch its two in-orbit satellites in January and March of 1989. It estimates that the cost to construct and launch the proposed system and to operate it for one year is $250 million. Federal Express asserts that it is financially qualified to construct its proposed system.

4. American Satellite Company (ASC) states that the Commission should defer action on the applications of Federal Express because the proposed launch dates are not prior to January 1, 1988. In addition, Satellite Business Systems, Inc. (SBS) is concerned about potential interference problems if Federal Express is authorized to place a satellite within 2° of an SBS satellite. Thus, SBS requests that the Commission expressly condition any such assignment with the requirement that adjacent satellites can be satisfactorily operated to provide services using antennas smaller than three meters.

5. We find that Federal Express is financially qualified to construct and launch its proposed system pursuant to our rules governing the financial qualifications of domestic fixed-satellite operators.[1] Federal Express's current assets are $450 million. Moreover, Federal Express has a bank loan for $250 million from

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[1] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to immediately proceed with construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983).

Citibank that is not contingent upon an action by either party that would arguably be impossible to perform. Thus, we conclude that Federal Express has demonstrated its financial ability to construct, launch and operate its proposed satellite system for one year.

6. Additionally, notwithstanding ASC's position that action should be deferred on Federal Express's applications because it does not propose to launch its satellites before January 1, 1988, we conclude that Federal Express, as a new entrant, has proposed to have its satellite system operational within a reasonable time frame. We also note that in regard to SBS's concerns surrounding interference from adjacent satellites in a 2° spacing environment, the Commission has convened a special advisory group to consider these types of issues.[2] Other issues raised by the parties with respect to orbital assignments are resolved in the *1983 Assignment Order*, FCC 85-396, adopted today, and will not be repeated here.

7. Accordingly, IT IS ORDERED that Application File Nos. 945/946-DSS—P/LA-84 and 947-DSS-P-84 ARE GRANTED and Federal Express Corporation IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

8. IT IS FURTHER ORDERED that Federal Express Corporation IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985).

9. IT IS FURTHER ORDERED that Federal Express Corporation SHALL COMPLY with the requirements of the *1985 Assignment Order*, FCC 85-396, (adopted July 25, 1985), as well as the terms and conditions of all other previous orders and authorizations.

10. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

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[2] Establishment of an Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites, FCC 84-488 (released January 15, 1985).

	Construction Commenced	*Construction Completed*	*Launch no later than*
Fedex #1	**January, 1986**	**July, 1988**	**September, 1988**
Fedex #2	**January, 1986**	**July, 1988**	**September, 1990**
Fedex #3	**January, 1986**	**July, 1988**	**ground spare**

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Federal Express Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in the *Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985) or *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985). Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. Federal Express Corporation is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—*Ford Aerospace Satellite Serv. Corp.*

FCC 85-413

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
FORD AEROSPACE SATELLITE SERVICES COPORATION	**File Nos. 528/529/530 -DSS-P/LA-83 948-DSS-P-84**
For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and to Sell Transponders on a Noncommon Carrier Basis	

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications submitted by Ford Aerospace Satellite Services Corporation (Ford) to construct three hybrid domestic fixed-satellites in the 4/6 GHz and 12/14 GHz bands and to launch two. Ford amended its original application to construct four and launch three satellites. Martin Marietta Communications Systems, Inc. (Martin Marietta) filed a petition to deny and American Satellite Company (ASC), RCA American Communications, Inc. (RCA Americom) and Satel-

lite Business Systems (SBS) filed comments. For the reasons discussed below, we grant Ford's applications for two hybrid domestic fixed-satellites and a ground spare in the 4/6 GHz and 12/14 GHz bands and deny the petition to deny.

2. Ford was formed by its parent company, Ford Aerospace and Communications Corporation, to enter the domestic communications satellite business. Ford Aerospace and Communications Corporation is a wholly owned subsidiary of Ford Motor Company. Ford Aerospace and Communications Corporation has designed and manufactured communications satellites for military and international use. Ford Aerospace Satellite Services Corporation is a new entrant and currently operates no commercial domestic satellite capacity.

3. Ford's proposed satellites will carry 24 transponders at 4/6 GHz, each with a bandwidth of 36 MHz and a nominal transmitter output power of 8.5 watts, and 24 transponders at 12/14 GHz, each with a bandwidth of 36 MHz and a nominal transmitter output power of 45 watts. The 4/6 GHz and 12/14 GHz transponders are cross-strappable. At 4/6 GHz, all 24 transponders will provide coverage of the 48 contiguous states, Alaska, Hawaii, and Puerto Rico/U.S. Virgin Islands. At 12/14 GHz, 12 transponders will provide coverage of the contiguous states, Alaska, and Hawaii, and the other 12 transponders will provide coverage of the contiguous states and Alaska. All 24 transponders can also be switched to an eastern or western regional coverage. Ford requests authority to offer services on a noncommon carrier basis. Ford's high capacity hybrid design proposes to use the geostationary orbital arc and associated frequency spectrum fully and efficiently. Proposed launch dates of the satellites are within the 1989–1990 time frame. The estimated costs of Ford's proposal are $489.5 million. Ford asserts that Ford Motor Company, its corporate parent, has assets that are substantially in excess of the amounts required to construct the proposed system.

4. Martin Marietta, in its Petition to Deny, argues that Ford should be allocated only one assignment in the 4/6 GHz band and one assignment in the 12/14 GHz band. Martin Marietta is in effect arguing that a hybrid satellite should be counted as two satellites. Additionally, Martin Marietta claims that Ford's application does not meet the basic filing requirements articulated in the *1983 Processing Order*[1] and that Ford's requested orbital locations are not consistent with the *1983 Orbit Assignment*

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[1] Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983).

order.[2] ASC claims that Ford's technical analysis concerning interference is misleading because it is approached from a "best case" perspective using, for example, an average antenna sidelobe discrimination value rather than a "peak" value and 30 meter antennas. RCA Americom states that Ford's analysis concerning immediate adoption of 2° satellite separations at 4/6 GHz is technically flawed. ASC states that consideration of Ford's second application should be deferred because its proposed launch date is not until 1988. ASC also believes there is a potential problem with Ford's legal qualifications if Ford has, as it asserts, expended $10 million on this project. Finally, SBS states that Ford's request for 93° W.L. would require extensive shifts in the assignments of 4/6 GHz satellites.

5. We find that Ford is financially qualified to construct and launch its proposed system pursuant to our rules governing the financial qualifications of domestic fixed-satellite operators.[3] Ford is a wholly owned subsidiary of Ford Motor Company, which has demonstrated current assets of $13.3 billion. This is more than enough to cover the cost of Ford's proposed system. Thus, we conclude that Ford has demonstrated its financial ability to construct, launch and operate its proposed satellite system. Thus, in accord with our policy concerning new entrants, Ford will be awarded two locations in both frequency bands for operation of two hybrid satellites. In addition, Ford will be granted a construction permit for an on-ground spare.

6. We find that Ford, as a new entrant, has proposed to have its entire system operational within a reasonable time frame and thus we will not, as ASC suggests, defer action on its application. Additionally, we conclude that the $10 million Ford has expended is not in violation of Commission rules or policies. This money was not expended to construct facilities prematurely, but rather was used for marketing and operational expenses, research and development, as well as a $100,000 deposit with NASA pursuant to a Section 319(d) waiver. Notwithstanding Martin Marietta's claims concerning the completeness of Ford's application, we conclude that Ford's applications contain sufficient information to

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[2] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983).

[3] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to immediately proceed with construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982).

be processed. Additionally, we find no reason to allocate only one orbital location to Ford. We have never treated an application for a hybrid satellite as an aplication for two satellites, and conclude that there is no reason to do so now. Other issues raised by the parties with respect to orbital assignments and 2° spacing are resolved in the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985), and will not be repeated here.[4] Finally, based on Ford's representations, we find that its unopposed proposed transponder sales and long-term leases are noncommon carrier in nature and are otherwise consistent with the *Transponder Sales Order*.[5]

7. Accordingly, IT IS ORDERED that Application File Nos. 528/529-DSS-P/LA-83 and 948-DSS-P-84 ARE GRANTED and Ford Aerospace Satellite Services Corporation IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

8. IT IS FURTHER ORDERED that Ford Aerospace Satellite Services Corporation IS AUTHORIZED to launch and operate two space stations in the domestic fixed-satellite service in accordance with the *1985 Assignment Order*, FCC 85-396, adopted today.

9. IT IS FURTHER ORDERED that Ford Aerospace Satellite Services Corporation SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396, adopted today, as well as the terms and conditions of all other preivous orders and authorizations.

10. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

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[4] Because Ford's satellites will obtain full frequency reuse in both bands, they meet our technical requirements as set forth in *Reduced Orbital Spacing*, 54 Rad. Reg. 577 (P&F) (1983), *recon.*, FCC 84-487 (released January 9, 1985).

[5] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). With the sale of these transponders and the others approved today, a total of 24.7% of all authorized transponders will be available on a noncommon carrier basis. This is not significantly different from the 21.7% of then authorized transponders we considered in the *Transponder Sales Order*.

	Construction Commenced	*Construction Completed*	*Launch no later than*
Ford #1	April, 1986	April, 1989	July, 1989
Ford #2	September, 1986	September, 1989	January, 1990
Ford #3	December, 1986	December, 1989	ground spare

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Ford Aerospace Satellite Services Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in FCC Docket No. 85-135, or *1985 Assignment Order*, FCC 85-396. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that Ford Aerospace Satellite Services Corporation IS AUTHORIZED to sell up to 96 transponders on its two operational satellites in accordance with Commission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982); *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

13. IT IS FURTHER ORDERED that the Petition to Deny filed by Martin Marietta Communications Systems, Inc. IS DENIED.

14. IT IS FURTHER ORDERED that Application File No. 530-DSS-P/LA-83 IS DISMISSED.

15. Ford Aerospace Satellite Services Corporation is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
— *GTE Satellite/GTE Spacenet*

FCC 85-414

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of	
GTE Satellite Corporation	**File Nos. 2084-DSS-LA-82 2085-DSS-P-82**
GTE Spacenet Corporation	**File No. 951-DSS-LA-84**
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and to Sell Transponders on a Noncommon Carrier Basis	

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. Before the Commission for consideration are the above-captioned applications submitted by GTE Satellite Corporation (GSAT) and GTE Spacenet Corporation (GTE Spacenet). GSAT is seeking authority to launch and operate its third satellite in the 12/14 GHz frequency bands and to construct a fourth satellite as an on-ground spare. GTE Spacenet seeks authority to launch and

operate its fourth hybrid satellite in both bands. These applicants propose to colocate their satellites. The GTE companies filed a joint amendment of their applications on June 7, 1985. A petition to deny was filed by Ford Aerospace Satellite Services Corporation (Ford).

2. In 1973, GSAT was formed by GTE Service Corporation as a separate corporate subsidiary to engage in domestic satellite operations. In 1980, GSAT was authorized to construct, launch and operate two domestic fixed-satellites in the 12/14 GHz bands and to construct a third such satellite to be used as an on-ground spare. These satellites are assigned orbital locations at 103° W.L. and 105° W.L. Additionally, GSAT participates in a combined AT&T/GSAT system using space segment capacity first leased from Comsat General Corporation, and now using AT&T satellites.

3. GTE Spacenet is a wholly owned subsidiary of GTE Corporation. Prior to its acquisition by GTE Corporation, GTE Spacenet (previously known as Southern Pacific Communications Company and later Southern Pacific Satellite Company) was authorized to construct three hybrid satellites and to launch two, later it applied and received authority to launch the third satellite and construct a fourth as an on-ground spare. These satellites were assigned orbital locations of 69° W.L., 88.7° W.L. and 120° W.L. Because these companies share the same corporate parent and have been filing joint submissions in this proceeding, we are addressing their applications in the same order.

4. In Application File Nos. 2084-DSS-LA-82 and 2085-DSS-P-82 GSAT amended previous applications and requested authority to launch and operate a domestic fixed-satellite in the 12/14 GHz bands that is currently authorized as an on-ground spare and to construct a fourth such satellite as an on-ground spare. Technical parameters are as specified in the referenced applications File Nos. and in File No. 2034-DS-S-MP-83. *See* Public Notice DS-86 and DS-208 of August 4, 1982 and September 19, 1983, respectively. The requested orbital location is 101° W.L., and colocated operation is proposed at this location with the satellite requested by GTE Spacenet. GSAT also requests authority to operate up to eight transponders on its third in-orbit satellite on a noncommon carrier basis.

5. In Application File No. 951-DSS-LA-84, GTE Spacenet requests authority to launch and operate a fourth hybrid domestic fixed-satellite in the 4/6 GHz and 12/14 GHz bands. This satellite is currently authorized as an on-ground spare. Technical parame-

ters are as specified in applications File Nos. 26-DSS-P-82 and 703-DSS-MP-84. *See* Public Notice DS-5 and DS-251 of October 21, 1981 and February 1, 1984, respectively. The requested orbital location is 101° W.L.

6. Ford, in a petition to deny, states that neither applicant has provided sufficient information with respect to transponder loading for its operating satellites. In addition, Ford alleges that the GSAT-GTE Spacenet proposal is technically inefficient.

7. In comments directed to GTE Spacenet, Satellite Business Systems (SBS) attacks the proposal as inefficient use of the spectrum and also states that the proposed colocation arrangement could violate the terms of the transfer of control from Southern Pacific Satellite Company to GTE Spacenet because it is not an arms' length transaction. In addition, the request for location at 101° W.L. should be denied according to SBS and American Satellite Company (ASC). Western Union Telegraph Company (Western Union) claims that GTE Spacenet has failed to provide evidence of need for additional orbit locations. Comments directed to GSAT filed by American Satellite, SBS and Advanced Business Communications Inc. (ABCI) raise similar issues.

8. In reply, GSAT states it did not have to provide transponder use data because its system was not yet operational and that its proposed location with GTE Spacenet is done on an arms' length basis. GTE Spacenet claims that it filed sufficient documentation of need and that the satellite proposal is efficient.

9. We find that GSAT and GTE Spacenet have demonstrated their financial qualifications pursuant to Commission rules governing the financial qualifications of domestic fixed-satellite operators.[1] Both GSAT and GTE Spacenet are relying on the assets of their parent corporation, GTE Service Corporation which has demonstrated assets of $4.2 billion. In supplemental information submitted June 7, 1985, the applicants indicated that only approximately 41 percent or about $64 million remained to be expended on their satellite proposal.[2] Thus, the GTE companies have demonstrated their financial qualifications.

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[1] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982).

[2] Pursuant to previously issued Commission waivers, construction of this system has already commenced.

10. With respect to the other issues raised regarding the GTE companies' applications, we find that the satellites proposed to be constructed and launched meet the Commission's efficiency standards.[3] In addition, we find that the colocation proposed by these applicants does not violate the terms of the transfer of control from Southern Pacific Satellite Company of GTE Spacenet.

11. In accord with our rules granting one expansion location when existing satellites are essentially filled,[4] we will grant GSAT authority to launch its previously authorized on-ground spare satellite to operate in the 12/14 GHz band. In addition, GTE Spacenet will be granted authority to launch its previously authorized on-ground spare to operate as a hybrid in both the 4/6 GHz and 12/14 GHz frequency bands. These satellites will be colocated. In addition, GSAT will be granted authority to construct an additional satellite as an on-ground spare. Finally, based on GTE's representations, we find that its unopposed proposed transponder sales are noncommon carrier in nature and are otherwise consistent with the *Transponder Sales Order*.[5]

12. Accordingly, IT IS ORDERED that Application File Nos. 2084-DSS-P/LA-82, 2085-DSS-P-82 and 951-DSS-P/LA-84 ARE GRANTED and GTE Satellite Corporation and GTE Spacenet Corporation ARE AUTHORIZED to construct one domestic communications satellite in accordance with the terms, conditions and technical specifications set forth in its applications.

13. IT IS FURTHER ORDERED that GTE Satellite Corporation and GTE Spacenet Corporation ARE AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1985 Assignment Order*, FCC 85-396, adopted July 25, 1985.

14. IT IS FURTHER ORDERED that GTE Satellite Corporation and GTE Spacenet Corporation SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396,

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[3] Because the hybrid satellite will obtain full frequency reuse in both bands, it meets our technical requirements as set forth in Reduced Orbital Spacing, 54 Rad. Reg. 577 (P&F) (1983), *recon.* FCC 84-487 (released January 9, 1985).

[4] *Report and Order*, FCC 85-395 (adopted July 25, 1985). One satellite operated by GTE Spacenet has only been launched recently and thus has not had the opportunity to achieve industry average fill. *See Report and Order* at para. 24.

[5] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). With the sale of these transponders and the others approved today, a total of 24.7% of all authorized transponders will be available on a noncommon carrier basis. This is not significantly different from the 21.7% of the then authorized transponders we considered in the *Transponder Sales Order*.

adopted today, as well as the terms and conditions of all other previous orders and authorizations.

15. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations.

	Construction Commenced	*Construction Completed*	*Launch no later than*
Spacenet IV			March, 1987
G-Star 3		November, 1987	March, 1988
G-Star 4	January, 1987	November, 1988	Ground Spare

16. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to GTE Satellite Corporation and GTE Spacenet Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or *1985 Orbit Assignment Order*, FCC 85-396. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

17. IT IS FURTHER ORDERED that GTE Satellite Corporation IS AUTHORIZED to sell up to eight transponders on its third 12/14 GHz satellite in accordacne with Commission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 1d 1238(1982), *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

18. IT IS FURTHER ORDERED that the Petition to Deny filed by Ford Aerospace Satellite Services Corporation IS DENIED.

19. GTE Satellite Corporation and GTE Spacenet Corporation is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned.

Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Forfeiture
Maritime Service, Shipboard, Violations

Commission upholds imposition of monetary forfeitures against vessel's owner and master for violation of listening watch requirement of Section 83.202(c) of Rules. Facts clearly establish that watch was not maintained. Failure to maintain continuous watch is not justified by "need" to turn down radio while addressing passengers over public address system — *Harry D. Parsons*

FCC 85-470

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Monetary Forfeitures Against

HARRY DALE PARSONS **PR-2961-S**
7 Vermont Avenue **3153109-004**
Lewes, Delaware 19958

Owner of the Vessel
THELMA DALE III
(Ship radio station WK-3617)

And

KASMIR RICHARD YAKIMOWICZ **3153109-003**
110 West Canal
Lewes, Delaware 19958

Master of the Vessel
THELMA DALE III
(Ship radio station WK-3617)

MEMORANDUM OPINION AND OORDER

Adopted: August 12, 1985; Released: September 17, 1985

BY THE COMMISSION:

1. The Commission has before it an application for review filed

February 11, 1985, by Harry Dale Parsons and Kasmir Richard Yakimowicz. They have applied for review of the imposition of monetary forfeitures of $250 against Parsons and $50 against Yakimowicz.

2. The forfeiture proceedings began when the Commission's Baltimore Field Office issued Notices of Apparent Liability ("NAL's") to Parsons on November 22, 1983, and to Yakimowicz on November 18, 1983, notifying them that they were apparently liable to monetary forfeitures of $500 and $100, respectively, for a violation of Section 83.202(c) of the Commission's Rules occurring July 28, 1983. That section requires maintenance of a listening watch (when the radio installation is not being used for authorized traffic) on the frequency 156.8 MHz aboard vessels subject to the provisions of Title III, Part III, of the Communications Act of 1934, as amended (the Act). Vessels which are subject to Title III, Part III, of the Act are those which transport "more than six passengers for hire" and which are "navigated in the open sea or any tidewater within the jurisdiction of the United States adjacent or contiguous to the open sea. . . ."[1] Such vessels are required by Section 381 of the Act to be equipped with an efficient radio installation in operating condition, which must be maintained and operated in accordance with the provisions of Title III, Part III, of the Act and the rules made pursuant to it.

3. The forfeitures were imposed under Section 386(a) and (b) of the Act. Section 386(a) authorizes a forfeiture of $500 per day against any United States vessel which is navigated in violation of the provisions of Title III, Part III, of the Act or any rule made pursuant to it. Section 386(b) authorizes a forfeiture of $100 per occurrence against the master of a vessel who willfully fails to enforce or comply with the provisions of Title III, Part III, of the Act or the rules made pursuant to it.

4. Parsons and Yakimowicz responded to the NAL's issued to them on November 22 and 18, 1983, with letters respectively dated December 14 and 19, 1983, in which they argued that the forfeitures should not be imposed. Notices of Forfeiture were issued to Yakimowicz (on March 8, 1984) and to Parsons (on March 20, 1984) which imposed the forfeitures but reduced the amounts from those originally proposed to $250 for Parsons and $50 for Yakimowicz. In a letter dated April 19, 1984, Parsons and Yakimowicz jointly requested reconsideration of the forfeitures.

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[1] See Section 381 of the Act. Certain exceptions not relevant here are specified by 382 of the Act.

On December 12, 1984, the Private Radio Bureau (PRB) sent letters to Parsons and Yakimowicz denying their request for reconsideration and leaving the forfeitures in effect. Yakimowicz and Parsons then jointly requested review of their forfeitures by the Commission *en banc*.

5. This proceeding is based on an investigation done by Engineer Dwight Weller, who is employed at the Commission's Baltimore office. On July 28, 1983, Weller was in Lewes, Delaware, to investigate possible violations of Section 83.202(c) of the Commission's Rules. Early on the morning of July 28, 1983, Weller observed several vessels leave port and go into the open sea with more than six passengers. These vessels included the THELMA DALE III which is owned by Parsons and whose master on that date was Yakimowicz. When the THELMA DALE III was returning to port shortly before 4:00 p.m., Weller repeatedly attempted to call that vessel on the frequency 156.8 MHz ("channel 16"), on which Section 83.202(c) of the Rules requires maintenance of a listening watch by vessels such as the THELMA DAE III. He also called on 156.650 MHz ("channel 13"), a commonly monitored navigational channel. The calls lasted about four minutes, but the THELMA DALE III did not respond. While Weller was calling he could see the bridge and navigational area of the THELMA DALE III and observed that no other radio communication was in progress.

6. When the THELMA DALE III arrived at the dock, Weller boarded it. He observed that the transmitter on the vessel, a Gemtronics GT 25/55, was turned off and that it was set on the frequency 156.575 MHz ("channel 71"). Weller questioned Yakimowicz, who stated that he had not stood a listening watch on channel 16 because he always operated on channel 71. He also stated that the THELMA DALE III's radio had been turned off, in order to save power, when Weller was attempting to call the vessel.

7. In their request for review as well as in previous correspondence Parsons and Yakimowicz claim that there were factual errors in the NAL's.[2] They claim that Yakimowicz at no time admitted to Weller that he did not stand a listening watch on channel 16 because he always operated on channel 71. They also contend that Yakimowicz did not admit that the THELMA DALE III's transmitter was turned off and contend that there

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[2] Parsons and Yakimowicz contend that the Commission did not respond to their previous claims of factual error. In fact, these claims were dealt with in the Notices of Forfeiture.

was no need to turn the radio off to save power. Additionally, they claim that the radio on the THELMA DALE III was a Gemtronics 5500 rather than a Gemtronics GT 25/55; that the THELMA DALE III docks at "Fisherman's Wharf" rather than at the "Angler Marina," as indicated in the NAL. Furthermore, Parsons and Yakimowicz express doubt as to whether Weller observed both the departure and the return of the THELMA DALE III.

8. Weller contradicts all of these claims, except for the description of the docking area. According to Weller, Yakimowicz did make the admissisons described above; the radio aboard the THELMA DALE III was a Gemtronics GT 25/55; and Weller did observe the vessel depart and return on July 28, 1983. Weller used the term "Angler Marina" to describe the general area where the THELMA DALE III docked; he was unaware that the exact description of that location was "Fisherman's Wharf," which is close to "Angler Marina."

9. None of the disputed facts is of decisional significance. In particular, the admissions of Yakimowicz are not needed to establish the violation of Section 83.202(c) of the Commission's Rules or the liability of Parsons and Yakimowicz to monetary forfeitures. Indeed, facts sufficient to establish the liability of Parsons and Yakimowicz are undisputed. It is not disputed that on July 28, 1983, the THELMA DALE III was navigated in the open sea with more than six passengers for hire, subjecting it to the provisions of Title III, Part III, of the Act. Additionally Parsons and Yakimowicz have not disputed the fact that the THELMA DALE III did not respond to Weller's calls on channel 16. In fact, in previous correspondence, although not in the application for review, they tried to explain why there was no response to Weller's calls. In his letter of December 19, 1983, Yakimowicz explained the failure to maintain a listening watch by stating that, having turned down the volume of the radio, he probably missed Weller's call while he was addressing passengers on the THELMA DALE III's public address system. Parsons stated in his letter of December 14, 1983, that the "primary job [of a vessel's master] has to come first, to pay the freight."

10. Failure to maintain a listening watch cannot be excused because the person responsible for maintaining the watch was occupied by other duties. This is made very clear by Section 83.202(c), which states that " . . . the crew member so designated may simultaneously perform other duties relating to the operation

or navigation of the vessel, provided such other duties *do not interfere with the effectiveness of the watch*" (emphasis supplied).

11. Parsons and Yakimowicz claim that Weller's calls to the THELMA DALE III could have lasted no longer than 2-5 minutes. The apparent implication here is that any transgression of Section 83.202(c) was so brief as to be of no consequence. This is not correct, since a *continuous* watch is required. Weller called for 4 minutes, a length of time which is a substantial discontinuity in the watch, and he certainly could not have been expected to continue his calling indefinitely.

12. The United States first adopted listening watch requirements following the *Titanic* disaster in 1912, in which much of the loss of life might have been averted if a nearby vessel had been maintaining a listening watch. In 1956 the Commission extended the listening watch requirement to Title III, Part III, vessels following congressional enactment of Part III. The listening watch on 156.8 MHz is an integral and essential part of the marine safety system. The maintenance of the watch on 156.8 MHz creates a network of vessels which are able to come to the aid of vessels in distress and to relay distress messages.

13. Parsons, the owner of the THELMA DALE III, argues that he should not have received a forfeiture ($250) five time as as large as that received by Yakimowicz ($50), the vessel's master, who actually committed the violation. The ratio of five to one is derived from the Communications Act; Section 386(a) provides for a forfeiture of $500 per day against vessels, while Section 386(b) provides for a forfeiture of $100 per occurrence against masters of vessels. Congress has seen fit to authorize a higher forfeiture for a vessel's owner than for the master, and we find ample justification for imposing a higher forfeiture on the owner. The difference is also justified because the ultimate responsibility for compliane lies with the owner of a vessel, who must take care to hire masters who will comply with the law.

14. In view of the above, we conclude that the forfeitures against Parsons and Yakimowicz are warranted. Therefore, IT IS ORDERED that the application for review of Parsons and Yakimowicz IS DENIED. IT IS FURTHER ORDERED that Parsons and Yakimowicz pay their monetary forfeitures of $250 and $50, respectively, within 30 days from the release of this Memorandum Opinion and Order. Payment should be made by money order or check drawn payable to the Order of the Federal

Communications Commission, using the envelopes previously provided.

15. IT IS FURTHER ORDERED that copies of this Memorandum Opinion and Order will be mailed to the parties at the addresses shown in the caption.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Antenna Change
Antenna, Height of,
Application, Amendment of, Engineering Change

Review Board denied an interlocutory appeal of an order refusing to accept an amendment proposing to lower an applicant's proposed antenna height so as to obtain FAA approval. Good cause for accepting amendment was not shown; applicant filed its application without FAA approval and then made no attempt to ensure that it had an acceptable tower proposal until the proceeding was well advanced, notwithstanding the fact the Commission designated an air hazard issue against it.

—*Horizon B/cing, Inc.*
MM Docket No. 84-762

FCC 86R-12

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
HORIZON BROADCASTING, INC.	MM DOCKET NO. 84-762 File No. BPCT-840323KH
CRESECENT CITY COMMUNICATIONS COMPANY, INC.	MM DOCKET NO. 84-769 File No. BPCT-840413KX
NOLA TV	MM DOCKET NO. 84-770 File No. BPCT-840413KY
MANDEVILLE COMMUNICATIONS COMPANY OF NEW ORLEANS	MM DOCKET NO. 84-771 File No. BPCT-840413KZ

For Construction Permit New Orleans,
Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1986; Released: March 18, 1986.

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed January 6, 1986, by Mandeville Communications Company of New Orleans (Mandeville) from a Memorandum Opinion and Order, FCC 85M–4689, released November 29, 1985, by Administrative Law Judge (ALJ) Byron E. Harrison. In that Order, the ALJ denied a Petition for Leave to Amend filed by Mandeville on August 23, 1985, which contained an amendment reducing the height of its proposed antenna tower from 1049 feet above ground level (AGL) to 585 feet AGL. By Order, FCC 85M–4877, released December 12, 1985, the ALJ granted Mandeville leave to appeal his prior interlocutory ruling, pursuant to Section 1.301(b) of the Commission's Rules, 47 C.F.R. § 1.301(b). Crescent City Communications Company, Inc. (Cresent City) filed an opposition to Mandeville's appeal on January 21, 1986. We affirm the ALJ's refusal to accept Mandeville's amendment.

2. Mandeville's proposed amendment arose from its inability to obtain a determination from the Federal Aviation Administration (FAA) that Mandeville's originally proposed 1049-foot tower would not constitute a hazard to air navigation. The 1049-foot tower that Mandeville first proposed was to be built and owned by Tiner and Associates, Inc. Tiner submitted a tower clearance request to the FAA in December 1983, well before Mandeville's application was filed. For reasons that are not entirely clear, in February 1984, Tiner asked the FAA to defer any further action on its proposal.[1] When Mandeville filed its application on April 13, 1984, it nevertheless specified the 1049-foot tower. Apparently, Mandeville was never told by Tiner that the FAA was no longer examining the clearance request, and Mandeville made no inquiries about the status of the request until January 1985, when Mandeville was informed of the deferral action by counsel for a

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[1] The ALJ found that Tiner's request was in response to FAA notification that its proposed tower would not receive approval unless it was reduced in height or relocated. FCC 85M–4689, at para. 8. By contrast, Mandeville claims that Tiner sought to defer FAA action in order to continue negotiations with other potential tenants on the tower. Appeal at 2–3.

competing applicant. Since no showing was made that the proposed tower would not constitute a hazard to navigation, an air hazard issue was designated against Mandeville when this proceeding was set for hearing on August 7, 1984.[2] Upon learning that the FAA was no longer considering its proposed tower, Mandeville submitted its own Form 7460-1 to the FAA on January 31, 1985, requesting approval of the same proposal as Tiner's. In March 1985, Mandeville hired an FAA consultant to evaluate the tower proposal and deal with the FAA. The consultant quickly concluded that the tower as proposed would not conform to FAA regulations and recommended a reduction in height to 585 feet AGL. The consultant states that he was told by Mandeville's counsel to proceed on the basis of the shorter tower[3]. He was informally told by the FAA on April 17, 1985 that the 585-foot tower would be acceptable, and a notice of clearance was given on April 22, 1985. This clearance was based upon an inaccurate assumption by the FAA, however - - namely, that the antenna would be side-mounted on an existing tower - - and a corrected no-hazard determination was not issued until June 17, 1985. Mandeville tendered the subject FCC amendment proposing a shorter tower two months later.

3. The ALJ denied Mandeville's petition for leave to amend, stating that Mandeville had not met the good cause requirements for post-designation engineering amendments set out in Section 73.3522(b) of the Rules, 47 C.F.R. § 73.3522(b), and *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 18 RR 2d 820 (Rev. Bd. 1970). The ALJ found that the facts demonstrated the foreseeability of Mandeville's transmitter site problem even before it filed its application and that Mandeville had not acted diligently in either submitting its amendment or seeking FAA clearance. He also found that Mandeville's conduct had disrupted the proceeding and prejudiced the other parties. The ALJ held that, contrary to Mandeville's claim that its amendment was subject to "a liberal interpretation" of good cause, post-designation engineering amendments modifying an applicant's technical proposal must meet a stricter good cause test than non-engineering amendments. We concur with the ALJ's conclusion.

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[2] Mandeville submitted a Motion for Summary Decision on this issue on August 23, 1985, at the same time it requested leave to amend its application to specify a shorter tower. The ALJ dismissed this motion as moot in the Memorandum Opinion and Order at issue here.

[3] The consultant's statement is attached to Mandeville's appeal.

4. The general elements of a good cause showing to justify a post-designation amendment, as set forth in *Erwin O'Conner Broadcasting Co., supra*, are: the moving party must show (1) that it has acted with due diligence; (2) that the proposed amendment is not required by its voluntary act; (3) that no modification or addition of issues or parties will be necessitated; (4) that the proposed amendment will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) that the other parties will not be unfairly prejudiced; and (6) that the applicant will not gain a comparative advantage. In its appeal, Mandeville again argues that a liberal good cause test should be applied in instances such as this where an engineering amendment is offered to cure a disqualifying defect. The Board agrees that a degree of leniency does enter into the evaluation of good cause when an amendment is intended to cure a disqualifying defect, for in *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, 49 RR 2d 1589, 1594 (1981), the Commission held that in such instances due diligence should be interpreted in light of the equities of the case. *See also Coastal Bend Family TV, Inc.*, 94 FCC 2d 648, 654-55, 54 RR 2d, 367, 372 (Rev. Bd. 1983). However, the fact that the issue which an amendment is inteded to meet is potentially disqualifying does not entirely relieve the applicant of the requirement to show good cause. *See California Broadcasting Corporation*, 90 FCC 2d 800, 808, 51 RR 2d 1539, 1545 (1982). Furthermore, as the ALJ held, when an engineering amendment is involved, Section 73.3522(b)(1) of the Rules imposes a strict additional requirement that the applicant show "that the amendment is necessitated by events which the applicant could not reasonably have foreseen." In the instant case, Mandeville does not meet several of the *O'Conner* criteria, and it is not aided by the equities of the case. It also fails the foreseeability test for engineering amendments specified in Section 73.3522(b)(1).

5. In applying the *Erwin O'Conner* criteria, the period for determining diligence runs from the time the applicant is, *or should have been*, apprised of the problem requiring amendment. *See Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058, 50 RR 2d 1259, 1261-63 (1982). Here, Mandeville should have understood that some action was appropriate to attempt to perfect is application as of right within 30 days after the August 1984 specification of the air hazard issue against it. *See* Section 73.3522(b)(2) of the Rules. However, it was not until January 1985 that Mandeville took any action, which amounted merely to filing

a request with the FAA in its own name for approval of the identical tower originally proposed. This was nine months after filing its application and five months after designation. Even then, Mandeville waited an additional three months (until April 17) to reduce its tower proposal to an FAA-acceptable height, and still an additional four months went by (until August 23) before it attempted to amend its FCC application to specify the shorter tower. These delays are especially egregious in view of the fact that Mandeville was not required to pursue any one particular course. In order to obtain an FAA no-hazard determination it could have switched to the lower tower height it eventually proposed, or it could have moved to a different transmitter site. It could even have striven to get the FAA to approve its original tower height. It was, however, required to elect some course of action and to pursue that course diligently. *See Music Sound Radio, Inc.*, 59 RR 2d 937 (Rev. Bd. 1985); *Neil I. Sanders*, 59 RR 2d 176 (Rev. Bd. 1985). *See also Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 714-18, 54 RR 2d 989, 991-93 (Rev. Bd. 1983), *rev. denied*, FCC 85-104 (Comm'n 1985). This Mandeville failed to do. It sat back ignoring the problem, apparently hoping that things would work themselves out. Under these circumstances we cannot find that Mandeville acted diligently in perfecting its antenna proposal.

6. From the above recitation, it is clear that Mandeville did not tender its amendment until this proceeding was well advanced. This factor distinguishes the instant situation from *Circle L, Inc.*, 58 RR 2d 965 (Rev. Bd. 1985), a decision relied on by Mandeville. The amendment involved there was filed three weeks before the initial prehearing conference and only nine days after the expiration of the period allowed for amendment as of right. Thus, that amendment did not present the problems of disrupting the proceeding and prejudicing the other parties that Mandeville's amendment does.[4] Also militating against acceptance of Mandeville's amendment is that, if it were to be accepted, an irregularity in the execution of the amendment would probably require the addition of an issue to determine whether the amendment was properly certified.[5] Nor do we find compelling Mandeville's argument that the amendment should be accepted since otherwise

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[4] The Mandeville amendment was proffered only three weeks before the third hearing session in this proceeding. FCC 85M-4689, at para. 10.

[5] The amendment, executed by a general partner of Mandeville, is dated August 18, 1985, and adopts and certifies the engineering material attached. The date on the signature of the engineering exhibit is, however, August 21, 1985, three days later.

Mandeville will be disqualified and the public will be deprived of having the "otherwise best qualified applicant" included in the comparative evaluation to determine who should receive the authorization. *Anax supra,* which Mandeville cites for support, merely allows some mitigation of the good cause standard when the equities call for acceptance of an amendment. Here, however, the problems with Mandeville's amendment arise from Mandeville's ignoring and failing to take any steps to correct a serious defect in its application for many months without any colorable justification. The equities with respect to Mandeville's amendment thus argue against its acceptance. The fact that the refusal to accept an amendment will lead to the disqualification of an applicant does not, *ipso facto*, foreclose that result; to hold otherwise would mean the wholesale nullification of the requirement that good cause be shown. *See Midwest St. Louis, Inc.*, 79 FCC 2d 519, 535, 48 RR 2d 108 (1980); *Trefoil Broadcasting Co., Inc.*, 94 FCC 2d 928, 932 (Rev. Bd. 1983).

7. Finally, Mandeville's amendment does not in any event comply with the additional requirement placed on engineering amendments by Section 73.3522(b)(1), the requirement that "the amendment is necessitated by events which the applicant could not reasonably have foreseen." It should have been obvious from the beginning that Mandeville's antenna proposal was troublesome and that an amendment would be a likely consequence.[6] This point is illustrated by the fact that when Mandeville finally hired an aeronautical consultant to address the matter, he immediately determined that the proposal was not consistent with the FAA's rules, and, within a month, he had determined what modifications would be necessary and had obtained informal approval from the FAA for those modifications. The site problem could also have been foreseen, had Mandeville bothered to inquire, when Tiner asked the FAA to defer consideration of the original 1,049-foot tower proposal. Mandeville simply put off examining and resolving a fundamental problem with its application until a too-late date. We cannot sanction Mandeville's willful know-nothingism and its reliance on the hope that the situation would somehow set itself aright. *See Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1031-32, 53 RR 2d 1203, 1206 (Rev. Bd. 1983), *rev. denied,* FCC 84-119 (Comm'n 1984); *aff'd per curiam sub nom.*

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[6] Mandeville does not dispute the ALJ's finding that other towers in the immediate vicinity of its proposed site did not exceed 586 feet above AGL. FCC 85M-4688, para. 14.

Royce International Broadcasting Co. v. *FCC*, 762 F.2d 138 (D. C. Cir.), *cert. denied*, 106 S.Ct. 410 (1985).

8. ACCORDINGLY, IT IS ORDERED, That the Interlocutory Appeal, filed on January 6, 1986, by Mandeville Communications Company of New Orleans IS DENIED; and

9. IT IS FURTHER ORDERED, That the Motion for Leave to File an Interlocutory Appeal in Excess of Five Pages, filed on July 6, 1986, and the Motion for Leave to File Supplemental Authority in Support of Interlocutory Appeal and Supplemental Authority, filed on February 5, 1986, both by Mandeville Communications Company of New Orleans, ARE GRANTED.[7]

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[7] Mandeville filed its request to exceed the page limitations at the same time it filed its appeal. Had the motion been filed earlier (and separately), it likely would have been denied for failure to show good cause. The subject matter of its 17-page appeal is not so unusual or complicated as to necessitate a pleading more than three times the standard page length. While we have accepted the appeal in this case, we adhere to the view that only in exceptional circumstances should appeals from interlocutory rulings exceed the 5-page limitation set forth in Section 1.301 of the Rules. And, of course, requests to substantially exceed page limitations should precede, not accompany, the subject pleading, Finally, while we have accepted Mandeville's February 5, 1985 supplementary pleading, which relies on *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1985), *aff'g Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 57 RR 2d 662 (Rev. Bd. 1984), we do not agree that these decisions support Mandeville's unforeseeability and diligence claims. There, unlike here, the FAA had first approved and then disapproved a site. That was unforeseeeable. Contraty to Mandeville's view, we find no "unforeseeable . . . and . . . prolonged FAA negotiations" (Supplement, at 2) in the instant case, only prolonged neglect and foreseeable consequences.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
> —*Hughes Communications Galaxy, Inc.*

FCC 85-415

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of HUGHES COMMUNICATIONS GALAXY, INC. For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and to Sell Transponders on a Noncomon Carrier Basis	File Nos. 1820/1821 /1822/1823- DSS-P/LA-83

ORDER AND AUHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. Before us for consideration are the above-captioned applications submitted by Hughes Communications Galaxy, Inc. (Hughes) to construct, launch and operate its fourth domestic satellite in the 4/6 GHz frequency bands and two satellitees in the 12/14 GHz frequency bands. Hughes amended its original request for three 12/14 GHz satellites. Hughes filed an additional amendment to its applications on June 7, 1985. Petitions to deny have been filed by Satellite Television Corporation (STC), Ford Aero-

space Satellite Services Corporation (Ford) and Martin Marietta Communications Systems, Inc. (Martin Marietta). For the reasons discussed below, we grant Hughes' applications for one 4/6 GHz satellite and two 12/14 GHz satellites and deny the Petitions to Deny.

2. Hughes is a wholly-owned subsidiary of Hughes Communications, Inc. which in turn is a wholly-owned subsidiary of Hughes Aircraft Company, control of which is expected to be acquired by General Motors Corporation.[1] Hughes presently owns and operates three 4/6 GHz satellites. Another Hughes subsidiary is the licensee of the Leasat system which provides communication services for the U.S. Navy.

3. In Application File No. 1820-DSS-P/L-83, Hughes requests authority to construct, launch and operate a domestic fixed-satellite in the 4/6 GHz bands. The proposed satellite will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 9 watts. Coverage can be provided of the 48 contiguous states and Puerto Rico/U.S. Virgin Islands, Alaska and Hawaii over all 24 transponders. The requested orbital location is 137° W.L. Services are proposed to be offered on a noncommon carrier basis.

4. In Application File Nos. 1821-DSS-P/LA-83 and 1822-DSS-P/LA-83, Hughes requests authority to construct, launch and operate two domestic fixed-satellites in the 12/14 GHz bands. Each satellite will carry 16 transponders, each with a bandwidth of 52 MHz and a nominal transmitter output power of 50 watts. Coverage will be provided of the 48 contiguous states, the eastern U.S. region, and the western U.S. region. The requested orbital locations are 73° W.L., 75° W.L. and 93° W.L. Services are proposed to be offered on a noncommon carrier basis.

5. STC, in its Petition to Deny or to Grant with Conditions, has asserted that Hughes has engaged in premature construction of the 12/14 GHz satellites proposed in its applications in violation of 47 U.S.C. § 319(a). Ford and Martin Marietta state that Hughes has not sufficiently demonstrated a need for its requested satellites. Ford also states that Hughes' proposal is technically inefficient. In comments, American Satellite Company (ASC) objects to Hughes' possible excess spare capacity. SBS asserts that Hughes' request for an orbital location at 93° W.L.

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[1] Our action here is without prejudice to any action the Commission may take on any future application concerning this acquisition.

should be denied.

6. Initially, we find that Hughes has not violated 47 U.S.C. § 319(a) by engaging in premature construction of its requested satellites. The affidavits submitted with the pleadings regarding this matter indicate that there were differing understandings of the meaning that HAC placed on the HAC statement cited by STC that the 12/14 GHz satellites in question were being constructed at Hughes' own risk and were "committed" to its subsidiary, HCG. STC also points out that Hughes had made a launch reservation for September, 1985, which according to STC, indicates a plan to finish construction of the satellaite by that time. In reply, HAC states, and STC never refutes this statement, that there was no implied or express contract to supply HCG with these 12/14 GHz facilities prior to Commission authorizaiton. HAC states that "committed" referred to a business plan for marketing this equipment and that, in fact, the satellites were eventually sold to Advanced Business Communications, Inc. HCG explains its launch reservation as being prompted by an anticipated increase in NASA fees. The reservation was to be used by Hughes only if it has obtained timely authorization and otherwise would be used by another purchaser of the satellite. STC fails to refute this explanation. STC has failed to raise a substantial issue of fact with respect to its allegations against Hughes and thus we find that its petition should be denied.[2]

7. With regard to the other issues raised, we find that Hughes meets our standard of efficiency. Other issues raised by the parties with respect to orbital assignments are resolved in the *1985 Assignment Order*, FCC 85-396, and will not be repeated here. With respect to questions raised as to Hughes' need for additional orbit locations, our assignment rules adopted today[3] dispose of these issues. Finally, based on Hughes' representations, we find that its proposed transponder transactions are noncommon carrier in nature and are otherwise consistent with the *Transponder Sales Order*.[4]

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[2] We would note here, however, that companies such as HAC which are corporately related to satellite manufacturers as well as to licensees should be cautioned to take sufficient precautions to ensure that any spacecraft construction does not violate Section 319 of the Communications Act, 47 U.S.C. § 319.

[3] Report and Order in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985); 1985 Assignment Order, FCC 85-396, (adopted July 25, 1985).

[4] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). With the sale of these transponders and the others approved today, a total of 24.7% of all authorized transponders will be available on a noncommon carrier basis. This is not significantly different from the 21.7% of the authorized transpon-

8. In a related action the Commission has adopted rules governing the financial qualifications of domestic fixed-satellite operators.[5] These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems.[6]

9. Hughes has demonstrated its financial qualifications. The financial information submitted shows $38.6 million in current assets in addition to a $300 million committed line of crdit from Bank of America. Because the estimated cost of its proposal is $287.9 million, Hughes has met the financial capability standard.

10. In accord with our rules of granting one expansion location when existing satellites are essentially filled, we will grant Hughes a fourth 4/6 GHz orbital location. In addition, because Hughes has no 12/14 GHz satellite authorizations, it will be treated as a new entrant in that frequency band and as such, will be awarded two initial 12/14 GHz orbital locations.[7]

11. Accordingly, IT IS ORDERED that Application File Nos. 1820/1821/1822-DSS-P/LA-83 ARE GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

12. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to launch and operate three space stations in the domestic Fixed-Satellite Service in accordance with the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985).

13. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985), as well as the terms and conditions of all other previous orders and authorizations.

14. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in

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ders we considered in the *Transponder Sales Order*.

[5] *See* note 3, *supra*.

[6] Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982).

[7] Report and Order at paras. 18 and 19.

accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

	Construction Commenced	*Construction Completed*	*Launch no later than*
Galaxy 4	October, 1985	December, 1987	March, 1988
Galaxy 5	October, 1985	March, 1988	September, 1988
Galaxy 6	October, 1985	September, 1988	March, 1989

15. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to sell 24 transponders on its fourth operational 4/6 GHz band and 32 transponders on its two operational 12/14 GHz band satellites in accordance with Commission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v. FCC*, F.2d 1465 (D.C. Cir. 1984).

16. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Hughes Communications Galaxy, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or *1985 Assignment Order*, FCC 85-396. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorizaiton, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

17. IT IS FURTHER ORDERED that the Petitions to Deny filed by Satellite Television Corporation, Ford Aerospace Satellite Services Corporation and Martin Marietta Communications Systems, Inc. ARE DENIED.

18. IT IS FURTHER ORDERED that Application File No. 1823-DSS-P/LA-83 IS DISMISSED at the applicant's request.

19. Hughes Communications Galaxy, Inc. is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond

within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Broadcast Record Past, See also Programming or Comparative Diversification
Financial Qualifications, Availability of Funds
Frequency Equitable Distribution of Under 307(b)

In hearing matter involving ten applicants, nine seeking authority to construct a new VHF television station on Channel 8, and the tenth seeking modification of its existing license for UHF Channel 26 to specify operation on Channel 8, the Review Board awards grant to the latter applicant seeking modification of its UHF license. The winning applicant was entitled to a very substantial preference under "best practicable service," for its past broadcast record.
—*Knoxville B/cing Corp.*
BC Docket No. 82-382

FCC 86R-13

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
KNOXVILLE BROADCASTING CORP. Knoxville, Tennessee	BC Docket No. 82-382 File No. BPCT-810209KE
COMMUNITY BROADCASTERS OF KNOXVILLE, INC. Knoxville, Tennessee	BC Docket No. 82-384 File No. BPCT-810612KE
EAST TENNEESSEE BROADCASTING Knoxville, Tennessee	BC Docket No. 82-385 File No. BPCT-810612KF
TENNESSEE TELECORP, INC. Knoxville, Tennessee	BC Docket No. 82-386 File No. BPCT-810615KG

KNOXVILLE TENNESSEE T.V., INC. Knoxville, Tennessee	BC Docket No. 82-388 File No. BPCT-810615KM
CITIZENS COMMUNITY TELEVISION, INC. Knoxville, Tennessee	BC Docket No. 82-389 File No. BPCT-810615KQ
TENNESSEE TELECASTING, INC. Maryville, Tennessee	BC Docket No. 82-391 File No. BPCT-810615KT
HHS, INC. Knoxville, Tennessee	BC Docket No. 82-392 File No. BPCT-810615KX
LE CONTE BROADCASTING COMPANY, INC. Knoxville, Tennessee	BC Docket No. 82-393 File No. BPCT-810615KY
SOUTH CENTRAL COMMUNICATIONS CORPORATION (WTVK-TV) Knoxville, Tennessee	BC Docket No. 82-394 File No. BPCT-810615LA
For Construction Permit for a New TV Station	

Appearances

William S. Andrews and *Richard D. Rochford, Jr.*, on behalf of Knoxville Broadcasting Corp; *John H. Midlen, Jr.* and Dale Richman, on behalf of Community Broadcasters of Knoxville, Inc.; *William T. Coleman, Jr., Donald T. Bliss,* and *John H. Beisner*, on behalf of East Tennessee Broadcasting; *Robert S. Stone* and *Rudolph L. Ennis*, on behalf of Tennessee Telecorp, Inc.; *John R.*

Feore, Jr., on behalf of Knoxville Tennessee T.V., Inc.; *Richard E. Wiley, Barry D. Wood*, and *William B. Baker*, on behalf of Citizens Community Television, Inc.; *John E. Fiorini III* and *Paul J. Heldenbrand*, on behalf of Tennessee Telecasting, Inc.; *Leo I. George* and *Joseph P. Benkert*, on behalf of HHS, Inc.; *John L. Tierney, Richard F. Swift*, and *Barbara R. Feeherry*, on behalf of Le Conte Broadcasting Company, Inc.; and *Edward S. O'Neill, Chase C. Libbey,* and *Gary P. Schonman*, on behalf of South Central Communications Corporation.

DECISION

Adopted: March 13, 1986; Released: March 19, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Knoxville Broadcasting Corp. (KBC), Community Broadcasters of Knoxville, Inc. (Community), East Tennessee Broadcasting (ETB), Tennessee Telecorp, Inc. (Telecorp), Knoxville Tennessee T.V., Inc. (KTTV), Citizens Community Television, Inc. (CCT), Tennessee Telecasting, Inc. (TTI), HHS, Inc. (HHS), and Le Conte Broadcasting, Company, Inc. (Le Conte), for authority to construct a new commercial VHF television station on Channel 8 in the vicinity of Knoxville, Tennessee. Against these, we have the competing application of South Central Communications Corporation, licensee of UHF Station WTVK-TV, Channel 26, Knoxville (WTVK), to move its current operation to VHF Channel 8 in lieu of UHF Channel 26. All of the applicants except TTI proposed Knoxville as their community of license; TTI proposed the community of Maryville, Tennessee, a much smaller community located approximately fifteen miles away from Knoxville. By *Hearing Designation Order* (*HDO*), 47 Fed. Reg. 32615, published July 28, 1982 (Mimeo No. BC-511), these applications (along with three other applications subsequently dismissed) were designated for consolidated hearing on air hazard issues specified against certain of the applicants; a Section 307(b) issue to determine which of the proposals would provide a fair, efficient and equitable distribution of radio service[1]; and a contingent standard

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[1] *See* 47 U.S.C. § 307(b).

comparative issue. Upon later motion, presiding Administrative Law Judge (ALJ) John M. Frysiak added a financial qualification issue against Community,[2] and reporting and financial issues against CCT.[3] The air hazard issues, and the financial issue against CCT, were resolved in favor of the applicants by *Summary Decision* or appropriate motion.[4] In an *Initial Decision* (*I. D.*), FCC 85D-56, released September 6, 1985, the ALJ concluded that the Section 307(b) issue was not dispositive; that Community had failed to establish its financial qualifications, and therefore was disqualified; and that Telecorp was the winning applicant under the contingent standard comparative issue. This proceeding is now before the Review Board on exceptions filed by the parties. We have reviewed the *I. D.* in light of the exceptions and reply briefs, the oral argument held January 10, 1986, and the underlying record. Except as discussed herein, we adopt the general findings of fact and conclusions of law in the *I. D.* However, as we explain below, we vacate the ALJ's conclusion that Telecorp is the comparatively superior applicant, and conclude instead that a grant of WTVK's application will best serve the public interest.

Discussion

2. As always, we are principally instructed in our comparative selection process by both the broad and the specific guidelines annunciated by the Commission in its seminal *Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 et seq.* (1965) (*Policy Statement*), as refined by nearly 20 years of competitive licensing proceedings held thereunder, and as modified by subsequent FCC policy pronouncements as well as by occasional judicial remediation. By and large, neither the primordial selection criteria by which competing applicants are compared, nor the Commission's dual objectives which anchor the choice of the predictively superior broadcast applicant have changed significantly over that two decade period. Just as in 1965, the

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[2] *Memorandum Opinion and Order*, FCC 83M-3289, released September 21, 1983.

[3] *Memorandum Opinion and Order*, FCC 83M-1325, released April 21, 1983; *Memorandum Opinion and Order*, FCC 83M-3287, released September 21, 1983.

[4] *Order*, 82M-2935, released September 23, 1982; *Memorandum Opinons and Orders*, 82M-2656, released August 30, 1982, 82M-2936, released September 23, 1982, 82M-3379, released October 28, 1982, and 83M-4270, released November 23, 1983.

Commission's two "primary objectives" in selecting the most promising broadcast applicant remain constant and steadfast:

> We believe that there are two primary objectives toward which the process of comparison should be directed. They are, *first*, the best practicable service to the public, and *second*, a maximum diffusion of control of the media of mass communications.

Policy Statement, 1 FCC 2d at 394. However, reflecting from past experience that every comparative broadcast licensing case presents slightly different facts, requiring both sensitive and pragmatic application of the Commission's 1965 outline of predictive indicia, the Commission carefully and purposively prefaced its *Policy Statement* with this ineluctable caveat:

> The hearing and decision process is inherently complex, and the subject does not lend itself to *precise* categorization or to the clear making of precedent. The various factors cannot be assigned *absolute* values, some factors may be present in some cases and not in others and the differences between applicants with respect to *each factor* are almost *infinitely* variable.

Id., at 393 (emphasis added). As will be developed at some length in our text below, the Board is here faced with a comparative broadcast licensing case that, although not completely without some homologous precedent from which to draw helpful direction, has no singular benchmark precisely on all fours. While this condition is, no doubt, true in many of our kaleidoscopic comparative proceedings, for the *Policy Statement* was prophetic in forecasting that every comparative case will have its own idiosyncratic legal and factual characteristics, this immediate case is uniquely imbued with subtle anomalies and equitable eddies not present in our more conventional comparative contests. Nonetheless, the Board has labored to apply the subsistent body of case law in a manner that faithfully retains the fullest fidelity to the *Policy Statement*'s two paramount comparative licensing objectives. We hae striven to do so with especial care in this unorthodox proceeding, a unique legal setting created with studied awareness by the Commission when it overrode its historic "UHF impact" policy and allocated ("dropped-in") an additional VHF television frequency into a heretofore three-station television market, then consisting of two VHF television stations intermixed with only one UHF television station.[5] The solitary UHF station, WTVK (Channel 26), had, then, no practicable option but to join this ensuing comparative proceeding as merely one of the many competing suitors for the new Knoxville VHF frequency. It is opposed here by nine remaining newcomers, all equally as avid for the rare VHF frqeuency now made available.

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[5] *See infra paras. 27-28*, for a more extensive discussion of *VHF Top 100 Markets*, 63 FCC 2d 840 (1977), the landmark policy decision leading to the serendipitous availability of this Knoxville VHF television channel.

3. After a thoroughgoing recitation of the pertinent decisional facts, followed by the application of his own legal analysis, the ALJ summed up his terminal comparative reckoning in the three final paragraphs of his initial decision, to wit:

> *Final Comparative Evaluation*
>
> 219. Under the diversification criterion KBC, ETB, Telecorp, Citizens, Lee Conte and Community have a slight diversification preference over KTTV, HHS and TTI. All of the applicants have an additional slight diversification preference over South Central [WTVK].
>
> 220. Under the integration criterion, Telecorp has a decisive edge over each of the other applicants. Telecorp's advantage can not be overcome by the qualitative attributes of any of the competing applicants. *The New Continental Broadcasting Co., supra.*
>
> 221. Telecorp is the clear winner, having a decisive edge under the integration criterion and having no media interests charged against it.

4. Needless to say, in view of the premium value of the VHF permit here sought — a newly created VHF channel within the top 60 U. S. television markets,[6] along with which channel will indubitably come the exclusive national television network affiliation now held tenuously by WTVK (*see infra para.* 30 and note 46) — the litigation here has been uncommonly spirited. And, equally predictably, the exceptions to the initial decision filed before the Board are proportionately voluminous. Yet, we have painstakingly assayed the full multitude of these objections so as to cull from the mass those several which might be "relevant and material" to the ultimate award in this case.[7] However, in consequence of our staunch and unanimous conviction that the ALJ committed decisional errors that unjustly deprived station WTVK of the construction permit award under the Commission's

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[6] *Broadcasting Yearbook* (1985), at C-214 (listing Knoxville as the 59th largest television market out of 209 standard TV markets in the U. S.).

[7] *See* 47 CFR § 1.281, which holds that exceptors to an initial decision of an ALJ are entitled to a "[r]uling on each relevant and material exception"; "irrelevant" exceptions may be denied "without a specific statement of reasons". *Id.* The Commission's function of reviewing exceptions to initial decisions has been delegated, pursuant to 47 U.S.C. § 155(c)(1982), to this Review Board. 47 CFR § 0.361 *et seq.*

venerable imperative of "best practicable service," *Policy Statement*, 1 FCC 2d at 394, many — if not all — of the minute exceptions exchanged as amongst the antagonists other than WTVK are neither legally compelling nor potentially decisional, even — we are certain — upon any full *de novo* review by our hierarchical superiors. Accordingly, we have limited our discussions below to those major exceptions which could have some bearing on the final result, in the contingency that the Board's instant decision is found on appeal to be faulty in any dispositive respect.[8]

Section 307(b) Issue

5. All of the instant applicants, save one, have specified Knoxville as their intended community of license; TTI along has specified the nearby community of Maryville, Tennessee, and it boldly seeks a conclusive comparative preference under 47 U.S.C. § 307(b), as amended. If one community is clearly preferred under the Commission's statutory frequency dispersal criteria, which criteria are intended to assure "a fair, efficient and equitable" distribution of radio and television channels amongst the various states and communities (*see id.*), then the construction permit applicant representing the clearly favored *community* prevails as a matter of law, without the need for any further comparisons as between the remaining mutually exclusive applicants for other, less favored communities. *See FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358 (1955). The ALJ very carefully considered the potential Section 307(b) virtues of Maryville as agianst the nearby city of Knoxville, *I.D.*, paras. 7–20, but concluded in the end that Maryville — a much smaller community which is integrally part of the greater Knoxville "urbanized area" (U. S. Census) — was entitled to no meaningful Section 307(b) preference over the nine Knoxville applicants. *I. D.*, paras. 186–194. As correctly explained by the ALJ, television broadcast channels are considered quite differently for Section 307(b) purposes, essentially because they are legally regarded as "regional" broadcasting facilities rather than purely "local" ones. *See, e.g., Cleveland Television Corp.*, 91 FCC 2d 1129, 1136–37 (Rev. Bd. 1982), *review denied*, FCC

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[8] We must here observe, though, that should the Board's firm conclusion that WTVK is clearly entitled to the construction permit grant to be found on appeal to be irredeemably infirm, we are otherwise in basic agreement with the ALJ's application of the *Policy Statement*'s selection criteria; and, accordingly, we would find that — "by the numbers" — Telecorp, the ALJ's initial awardee, is the *next* comparatively superior applicant behind WTVK.

83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D. C. Cir. 1984)[9]; *Washington's Christian Television Outreach*, 99 FCC 2d 395, 408-410 (Rev. Bd. 1984), *aff'd in pertinent part*, FCC 85-501, released September 16, 1985 (Comm'n), *appeal pending*, No. 85-1649 (D. C. Cir. October 10, 1985). Therefore, we find no error in the ALJ's factual findings or conclusions on the Section 307(b) issue, affirming the initial decision without any modification in that elemental regard.

Financial Disqualification of Community Broadcasters

6. The ALJ found that Community was not financially qualified to build and operate its proposed Knoxville station (according to its own estimated costs of $2,784,936). *I. D.*, paras. 30-36 (findings); *see also id.*, at paras. 198-199 (conclusions). In its 1-page exception on this basic qualifying issue, Community does not quarrel with any of the ALJ's objective findings of fact; it merely argues that, given sufficient time and opportunity, it has a plausable "plan" which it believes will — when and if it reeives the construction permit — provide it with the funds necessary to effectuate its construction and operational program. We can add very little to either the ALJ's factual findings or his legal conclusions on this issue. The Commission requires that a broadcast applicant have "reasonable assurance" of the necessary future funds to construct, and to operate for three months thereafter, at the time the application is filed. *GACO Communications Corp.*, 94 FCC 2d 761, 781-782 (Rev. Bd. 1983), *aff'd in pertinent part*, FCC 84-212, released May 14, 1984) (Comm'n).[10] Stated another way, a broadcast construction permit applicant must be "*ready, willing*, and *able*" to effectuate its proposal at the time of application, *Dutchess Communications Corp.*, 101 FCC 2d 243, 254 (Rev. Bd. 1985), and may not — as Community has done here — proceed "without seriously confirming the rudimentary struts of its proposal; and, in the manner of Dickens' Mr.

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[9] There the Board held:

> Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues . . . the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) "purposes should be defined in terms of coverage and not in terms of artifical political boundaries." [citation omitted]

91 FCC 2d at 1137. That proposition is a matter of very long-settled communications law. *See, e.g., St. Louis Telecast, Inc.*, 22 FCC 625 (1957).

[10] *See New Financial Qualifications Standards for Broadcast Television Applicants*, 72 FCC 2d 784 (1979).

Micawber, hope that 'something will turn up.' " *Id.*, at 255. So far as we are able to comprehend, Community claims that it has an elaborate "plan" by which some (yet unknown) institutional "pension fund" will transfer over $5 million to a Florida bank, which bank would then lend the "pension fund" money to Community, which — in turn — will purchase a 5-year, $3.7 million annuity from an insurance company. *Id.*,para. 33. The proceeds of the prospective annuity would then finance Community's station. However, the record reflects that, even at oral argument before this Board, no arrangements whatever had been for any uncollateralized $5 million loan from any "pension fund"; nor had any of the other dubious aspects of this visionary plan been arranged with specific funding institutions.[11] By its own admissions, Community stands nakedly before this Board with nothing more than the amorphous notion that some "pension fund," identity unknown at this time, will provide $5 million down the line, so that Community may, in turn, purchase a $3.7 million insurance annuity, which proceeds might then be used to secure a bank loan to Community.[12] To put it charitably, Community's assertions of "reasonable assurance" of adequate financial resources have been sorely devoid — almost since the commencement of this proceeding — of any tangible substance, and the ALJ's disqualification of that applicant was not only correct, but virtually compulsory under the Commission's minimum requirements for basic financial ability. *See, e.g., Gaco Communications Corp., supra.*

Diversification of Media Control

7. The ALJ found that ETB, Le Conte, Telecorp, Community, CCT, and KBC had no other cognizable interests in media of mass communications, and were thus entitled to a slight "diversification" preference over KTTV, HHS and TTI, all of whom have some ownership interest in other media facilities. *I.D.*, paras. 202-203, 206. He further found that all of the applicants were entitled to appropriate "diversification" preferences over WTVK, because of that licensee's ownership of other media properties in

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[11] *See generally* Tr. of Oral Arg. (January 10, 1986) at 3002-3018.

[12] Appearing *pro se* at oral argument, Community principal, Dale Richman, conceded that "no pension group has committed to transfer funds" to the Florida bank on which Community apparently hopes to rely, *see* Tr. of Oral Arg. at 3011; that Community was without resources to collateralize any potential multimillion dollar loan, *see id.* at 3008-3009; and that, to date, no principal of Community "has even spoken" to the bank to determine the likelihood that a loan would be made. *See id.*, at 3012-3013.

Tennessee. *Id.*, para. 206. In this latter regard, he counted against WTVK its FM radio station in Nashville, Tennessee and its two other radio stations in Indiana. The ALJ did not, however, charge WTVK with its present ownership of the radio station in Knoxville, because WTVK must divest itself of the Knoxville FM station if its instant VHF application is granted. *Id.*, para. 205. In the "diversification" exceptions filed by the parties, Telecorp contends that CCT's principal (George H. Thompson, a 29% shareholder) acquired, after the "B" cut-off date, a 25% interest in a trust that owned 11.11% of an AM/FM radio combination in Panama City, Florida. Telecorp argues that such subsequently acquired interests are now attributable to CCT, and that the ALJ erred in failing to assess CCT a "diversification" demerit. CCT rejoins that the ALJ properly ignored these interests since Thompson pledged to divest them in an application amendment reporting their acquisition. As a general proposition, a pledge to divest later-acquired media interests made within the 30-day reporting period (pursuant to Section 1.65 of the Commission's Rules) is all that is necessary to keep a post-"B" cut-off acquisition of media from being charged to an applicant under the "diversification" criterion. *See Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1221-1222 (Rev. Bd. 1984). Here, however, CCT's Thompson owned the subject media interests for approximately eight months before they were reported, *see I.D., paras.* 22–23, and we find that the contested media interests are legally attributable to CCT. *See Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 985 (Comm'n 1984). These later interests, however, are not very significant and warrant only a very slight "diversification" demerit against CCT. *See Jerome Thomas Lamprecht, supra.*

8. KBC's "diversification" preference is also attacked. Thus, HHS urges that various (out-of-state) media interests owned by KBC's nonvoting shareholders should have been charged to the applicant. It further contends that KBC should be assessed a proportionate demerit, because KBC's 8.25% shareholder, Sam Newman, owns an advertising agency in Knoxville. We agree with exceptors that the media interests of KBC's nonvoting shareholders are cognizable. But, such passive interests are given only very slight weight as a comparative "diversification" factor. *See Cleveland Television Corp., supra*, 91 FCC 2d at 1139. On the other hand, an advertising agency, *simpliciter*, is not ordinarily considered to be a "medium of mass communications." *See Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1319 (Rev. Bd.

1983). Such an interest would impact upon the "diversification" factor only if it is shown in some unusual way to undermine the core objective of the Commission's media "diversification" policy. *See Apogee, Inc.*, 99 FCC 2d 979, 986 n.8 (Rev. Bd. 1985). No such demonstration has been made in this proceeding. Finally, HHS argues also for a change in basic Commission policy to permit it to be treated in the same legal fashion as those applicants having no other interests, because the other HHS media interests are located outside the proposed Knoxville service area. We will summarily deny this exception; it is plainly outside of our delegated authority. *See, e.g., Horne Industries, Inc.*, FCC 83-208, released May 3, 1983 (Comm'n). Accordingly, we find that ETB, Le Conte, Telecorp and Community are entitled to slight "diversification" preferences over CCT, KBC, KTTV, HHS, and Telecorp., and a slight-to-moderate preference over WTVK. *Cf. Omaha TV 15, Inc.*, FCC 85-91, released November 21, 1985 (Rev. Bd.) (and cases cited therein).

Integration of Ownership and Management

9. Paras. 207-218 of the *I.D.* set out in great detail the quantitative and qualitative "integration" merits of the ten applicants, and the ALJ's reasons for rejecting various other such claims. Briefly, the quantitative integration percentages credited by the ALJ were: Telecorp — 80% fulltime; KTTV — 49% fulltime; CCT — 43% fulltime; KBC — 42.25% fulltime, 8.25% part time; Community — 25% fulltime; ETB — 24.4% fulltime, 25.2% parttime; Le Conte — 17% fulltime, 43% part time; and WTVK, TTI, and HHS each with 0%. Hence the *I.D.* found that Telecorp had a decisive quantitative "integration" advantage which lead could not be overcome by the various qualitative attributes of its adversaries.

10. Inasmuch as we find that the ultimate award in this unorthodox case turns on grounds above and beyond the great bulk of the ALJ's stated findings and conclusions (or any and all of the exceptions directly responsive thereto) relating to the non-WTVK parties, we concomitantly believe that the internecine exceptions relating to the losing applicants' "integration" credits are not discernibly material to our final decision. Nonetheless, out of an abundance of caution, we do take the time to review several components of the *I.D.*'s "integration" analysis that might possibly, upon appeal, take on some latent significance as

amongst those applicants most closely in line below the Board's declared winner.

11. The first of these potentially material exceptions relates to the ALJ's complete denial of "fulltime" ownership "integration" credit for Thomas L. Moore, a reported 50% owner of CCT. In short, the ALJ denied all personal "integration" credit to Thomas Moore because, since 1979 *and* at the very time of the filing of CCT's application with the Commission in which Moore personally pledged to be a "fulltime" manager of the proposed CCT television station,[13] Moore was *concurrently* an active participant in a federal minority contract set-aside program administered by the Small Business Administration. More specifically, Thomas Moore was — at all times here pertinent — President, Chairman of the Board, and sole shareholder of TAM, Inc., a minority business firm which contemporaneously held a number of ongoing service contracts with U.S. government agencies awarded pursuant to the SBA's Sec. 8(a) set-aside program, a compassionate program designed to specially assist individual minority entrepreneurship. *See I.D.*, para. 134. However, a *fundamental prerequisite* for TAM, Inc.'s basic eligibility in the SBA Sec. 8(a) program was that "individuals upon whom eligibility is based [must be] engaged full-time in the day-to-day business operations of management [and be precluded from] outside employment and other business interests."[14] Thomas Moore does not at all dispute that he, *personally*, was the specific "individual" upon whom TAM, Inc.'s basic SBA Sec. 8(a) eligibility was predicated.

12. Despite the unambiguous and unarguable import of the SBA's primal Sec. 8(a) eligibility requirement for Thomas Moore's "fulltime," "day-to-day" management participation in TAM, Inc.'s assorted U.S. government contractual obligations,[15] and its even more restrictive prohibition against *any other* "outside employment and other business interests," Moore blithely testified in this proceeding that he saw no real conflict between the SBA's "fulltime" Sec. 8(a) eligibility requirement and his coexist-

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[13] A "fulltime" integration credit, in FCC comparative cases, requires a *personal* commitment on a "40 hours per week" basis. *See Vactionland Broadcasting Co., Inc.*, 97 FCC 2d 485, 491 (Rev. Bd. 1984) (subsequent history omitted).

[14] CCT Exceptions at 8, quoting U.S. Small Business Administration, Office of Minority Small Business and Capital Ownership Development, Standard Operating Procedure 80 05 at 26 (1979).

[15] SBA Sec. 8(a) contractors, as eligible minority firms, are awarded government contracts outside of normal procurement channels. Moore's TAM, Inc. has been continuously awarded a number of "construction, food and custodial" contracts" at federal installations under the Sec. 8(a) program since 1979. *I.D.*, para. 134; *see also* Tr. at 1233–1244.

ing FCC application proposal to be the President and "fulltime" General Manager of CCT's applied-for Knoxville television station. *See I.D.*, paras. 134; 214.[16] Indeed, despite routinely representing to the SBA that he was validly conforming with its very strict *personal* management eligibility commitment to TAM, Inc., Moore's testimony at this hearing demonstrated a revealingly casual attitude toward his "fulltime" personal commitment to the SBA. At one point, for example, laboring hard to advance his *prima facie* inconsistent FCC application, Moore freely deposed that his personal time spent on TAM, Inc.'s various SBA contractual businesses was "less than fulltime." *See* Tr. at 1248. Later, Moore unselfconsciously insisted that "I don't find it necessary for me to spend *any time* unless I want to at this time." *Id.*, at 1249 (emphasis added). Or, stated differently, Moore testified that — as to his efforts as President of TAM, Inc. in 1981-1982: "I spent very little time. I didn't find it necessary to spend a lot of time." *Id.*, at 1250. Going even further, Moore declaimed:

> I'm president and chief executive officer. I have hoped to have been in my business since day one and know as much about it as I do, are more education than I am. I don't find it necessary for me to spend any time less I want to at this time.

Id. at 1249.

13. Hence, despite the SBA's strict *personal management* eligibility requirement for its Sec. 8(a) contractors which — as it turns out — is remarkably similar to the FCC's *personal management* requirement for eligibility for comparative "integration" credit, *see Policy Statement*, 1 FCC 2d at 395-396, Thomas Moore continued to apply for (and to receive) SBA Sec. 8(a) contracts at the *same exact time* that his application with the FCC was similarly proposing Moore's "fulltime" management participation as the President and General Manager of the potential CCT station. Lest anyone doubt the flagrancy of Moore's irreconcilable conflict, the hearing record shows that on March 5, 1982 — some six months (or more) *after* the filing of his instant FCC application — Thomas Moore wrote personally to the SBA asking for yet another extension of his Sec. 8(a) eligibility,

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[16] *See also* CCT Exceptions at 4-11. Therein, CCT continues numerous sophistical arguments such as "that the term 'fulltime' can convey different meanings in different contexts" (*id.*, at 6); or that Moore's casual and convenient understanding of the SBA's "fulltime management" eligibility requirement meant "whatever number of hours it took to operate" the various SBA Sec. 8(a) businesses funneled to TAM, Inc.

not merely for *one* more year (or, at maximum, until a potential FCC grant of CCT's license application), but for *six* more years *after* March 5, 1982. Tr. at 1281. That is, Thomas Moore's March 5, 1982 letter to the SBA contained the passionate plea that the standard one-year SBA Sec. 8(a) extension would be thoroughly unsatisfactory to TAM, Inc. Moore's personal 1982 missive to the SBA — urging the extraordinary 6 year extension — pleaded: "But to limit TAM to one more year of 8A support and participation would be a *tragic mistake*." *Id.*, at 1282 (emphasis added). No mention at all was made of Moore's pending FCC application in that letter, or of his "fulltime" personal management proposal pledged to the FCC in connection with that pending application.[17]

14. Under the foregoing circumstances, we support the ALJ's denial of personal management "integration" credit to CCT for Thomas Moore as that applicant's proposed General Manager. Even apart from the clear documentary evidence reflecting two mutually exclusive "fulltime" personal management pledges to two different federal agencies in order to secure very special and valuable privileges from both agencies, Moore's unfulfilled commitment of "fulltime," "day-to-day," "personal" supervision of TAM, Inc.'s SBA federal contract businesses, coupled with his exceedingly nonchalant attitude toward the SBA's most basic eligibility requirements, entitles Moore to little, if any, credibility on his "fulltime" management participation pledge to the FCC. Based on this hearing record, we have no trust whatever that Thomas Moore would show any greater honor to his FCC pledge of "fulltime," personal management of CCT's communications business than he did to that virtually synonymous pledge made to the SBA with respect to his stewardship of TAM, Inc.[18] [19] The

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[17] In fact, Moore did not even perfunctorily advise the SBA of his conflicting FCC personal management commitment to CCT until the cat leapt out of the bag during later stages of this extensive proceeding. *See generally* Tr. of Oral Arg. (January 10, 1986), at 3042-3043.

[18] We recognize keenly that we have no authority whatsoever to vindicate the SBA's rules and regulations, and our affirmance of the ALJ's denial of Thomas Moore's attempt to receive personal management "integration" credit from the FCC has absolutely no such punitive purpose. We deny that "integration" credit here, as did the ALJ, because Moore's *prior* pledges to the federal government of a "fulltime," *personal* commitment to a particular business have been exposed as not to be taken at all at face value. Nevertheless, we would hope that our Office of General Counsel might consider bringing this interesting record to the direct attention of the SBA, for whatever salutary purpose it might now serve.

[19] As a final note here, we remind the reader that — for reasons explained *infra* — even granting Moore's personal "integration" proposal *in full* would not result

ALJ's ruling on Moore's "integration" pledge is soundly affirmed in these quarters.

15. The next "integration" matter having, perhaps, a peremptory impact concerns the ALJ's refusal to accord any comparative recognition whatever to the 30-day "past broadcast record" of station WTVK's local service to the Knoxville community (about which more *infra*, paras. 24–33), a fatal and nullifying ruling he linked *directly* and *integrally* to his rejection of even the slightest personal management "integration" credit to WTVK's 74.8% owner, John D. Engelbrecht, who proposed nothing more here than to continue his current role as General Manager of station WTVK, a position he has held with that same Knoxville television station since 1974. The ALJ's rationale was stated as follows[20]:

> South Central [WTVK] proposes to integrate John D. Engelbrecht (74.8%) owner as full-time general manager. However, he will be spending one week per month in Evansville overseeing the company's radio stations and one-half week per month in Nashville overseeing the company's other radio station. This will prevent him from spending time on a daily basis at the Channel 8 facility and precludes full-time integration credit.

More injuriously, the ALJ refused even to accord WTVK the lesser "substantial" or "parttime" management "integration" credit alternatively available for John D. Engelbrecht's uncontradicted pledge of his continuing role as General Manager of WTVK. *I.D.*, para. 218.[21] As a linear result thereof, the ALJ, in a completely unprecedented action, refused to credit in the least — *or in any particle* — the entire 30-year "past broadcast record" of television station WTVK in the Knoxville market, a service record which the ALJ himself inspected at length in his own findings of fact. *See I.D.*, paras. 168–185.

16. WTVK inveighs against both the ALJ's denial of "fulltime" credit for the continued General Managership proposal of John D. Engelbrecht, and against the ALJ's collateral refusal to accord probative recognition to station WTVK's extension "past broadcast record" in the Knoxville community. WTVK submits[22]:

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in our own award of the construction permit to his applicant, CCT. We would still find WTVK the clear-cut winner.

[20] *I.D.*, para. 218.

[21] "Substantial" integration credit is awarded for management principals who propose to work at least 30 hours per week. *See e.g., Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 953 (Rev. Bd. 1981) (subsequent history omitted). "Parttime" integration credit is awarded for a credible pledge of at least 20 hours per week devoted to personal management activities. *See, e.g., Van Buren Community Service*, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981) (subsequent history omitted).

[22] WTVK Exceptions at 27–28.

> Although the I.D. made extensive findings of fact with respect to South Central's past record, the Judge summarily denied consideration thereof by erroneously linking WTVK's past performance to the future integration of John D. Engelbhrecht. *I.D.*, at para. 218. That ruling is irreconcilable with the guidelines established in the 1965 *Policy Statement* and constitutes reversible error.
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> The 1965 *Policy Statement* expressly provided that an applicant's past broadcast record is to be considered as an entirely separate and independent comparative factor from integration of ownership into management. 1 FCC 2d at 398.
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> * * *
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> The Commission stated in the 1965 *Policy Statement* that it would consider several attributes of participating owners in weighing integration of ownership into management, including "previous broadcast experience." The Commission, however, distinguished between "previous broadcast experience" and "past broadcast record." Since emphasis on experience alone could discourage qualified newcomers from applying for facilities, and insofar as one's lack of prior experience is remedial, past broadcast experience was deemed to be of minor significance. 1 FCC 2d at 396. On the other hand, past broadcast record is a factor of substantial importance since it provides the most reliable method for predicting future performance as a Commission licensee. *Id.* at 398.

17. For reasons explained somewhat more contextually *infra* at para. 19, we agree that the ALJ erred radically in fusing inextricably the "enhancement" element that would attend WTVK's basic "integration" credit due to any personal management involvement of John D. Engelbrecht (and the additional "enhancement" credit for Engelbrecht's own personal "past broadcast experience") with any wholly discrete credit which would be due WTVK for its "past broadcast record" in the Knoxville community. While it cannot be argued that — as a predictive factor — a "past broadcast record" is, in certain respects, ascribable to the various management officials responsible for diverse facets of a given station's record,[23] the point here becomes somewhat moot inasmuch as John D. Engelbrecht has proposed — so far as the record shows — to play the same general management role at WTVK's in the future as he has in the recent past. Considering that WTVK's instant quest for the more valuable VHF frequency carriers with it no ostensible changes in the essential *modus operandi* which produced the station's "past

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[23] We are certain that South Central Communications officials and employees *other than* John D. Engelbrecht have also played a substantial role in WTVK's overall "past broadcast record," whatever the record might be. WTVK has 80 (or so) other employees, all — we presume — contributing to the formidable effort it takes to operate a sizeable television station.

performance record" here surveyed, we see absolutely no rational basis — as a *predictive* matter — to presume any adverse change in WTVK's *future* public service performance.[24]

18. Moreover, and as an incidental element of the *I. D.*'s interconnected mistakes that deprived station WTVK of any and all comparative consideration of its "past broadcast record", we further believe that the ALJ's flat rejection of any quantum of management "integration" credit to John D. Engelbrecht was unprecedented and unjustified in the extreme. WTVK argues[25]:

> Mr. Engelbrecht made an unequivocal and unrebutted pledge to work at least 40 hours per week at the proposed station. [WTVK Exh.] No. 3 at p. 1. He will be the station's General Manager, and in such capacity he will have ultimate authority for all station functions. *Id.* He pledged to relocate South Central's corporate headquarters to Knoxville. *Id.* He will move his principal residence and his family to their home in Kodak, Tennessee, which is located within the city grade service area of the existing and proposed WTVK operations. *Id.*; Tr. 2485, 2524. While he will continue to oversee other South Central operations, he will do so through an existing staff structure which includes a General Manager for each of its radio stations and for each Muzak franchise. [WTVK Exh.] No. 3 at p. 1; Tr. 2595-96.

19. Based on consistent precedent which carefully apportions management "integration" credit on a graduated scale, running from "slight" comparative credit for a principal's pledge to devote approximately 20 hours per week to station management, to "substantial" credit for a pledge of at least 30 hours per week, to "fulltime" credit for at least 40 management hours per week (*see supra* note 13 and cases cited therein), we find the ALJ's categorical denial of "integration" credit to station WTVK for the undisputed "integration" proposal of John D. Engelbrecht to have been based, it seems, on an erroneously literal reading of the general "per week" guidelines used in comparative cases to demarcate the incremental levels of "integration" credit available to principals who pledge to devote personal management time to

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[24] Indeed, a position on the VHF television dial — and the ensuing competitive equalization with WTVK's two VHF competitors — could only lead to a reasonable presumption of better things to come as a result of the station's enhanced financial resources. Furthermore, we note that, although the issue apparently did not arise in that case in the same manner as here, the Commission's decision to award a television station license based on one competing applicant's meritorious "past broadcast record" in its home market was apparently not fused to the "integration" proposal of any past management official or officials of the winning licensee. *See Farragut Television Corp.*, 8 FCC 279, 283-284 (1967).

[25] WTVK Exceptions at 30-31.

the station. Our reading of the case law, especially as applied to the undisputed facts before us, persuades us that John D. Engelbrecht is surely entitled, at the very least, to the basic "integration" credit that accompanies the devotion of "substantial" time to the management affairs of station WTVK. That is, we find that the hearing record reflects that John D. Engelbrecht will devote, by his own candid formulation, approximately 75% of his *en gros* South Central Communications management activities specifically to television station WTVK. Whether or not that effort averages out, on a "weekly" basis, to a strict 40 hours (though we suspect it will) is largely inmaterial, given the uncontradicted pledge, and the previous management record of, John D. Engelbrecht, was prejudicial error, even though we find — *at the same time* — that the "past broadcast record" of station WTVK — whose record, for better or worse, is attributable to the management and labors of many others apart from John D. Engelbrecht — stands basically on its own as an independent comparative element. *Policy Statement*, 1 FCC 2d at 398. The personal "integration" aspect involving John D. Engelbrecht is, as a comparative matter, merely tangential to the more comprehensive prognosis of WTVK's prospective performance, based on that particular station's "past broadcast record," a severable matter we address below in due course.

20. And finally, because it involves the applicant selected by the *I. D.* as the comparative winner under the ALJ's reading of the *Policy Statement's* criteria of "diversification" and "integration,"[26] we take up the exceptions of Telecorp grounded upon the ALJ's refusal to accord management "integration" credit to its (20%) principal, Sue Carr-Walker. The ALJ concluded[27]:

> Mrs. Walker, who is nearly 60 years old has never held a job. She has no experience in broadcasting or coordinating and supervising the promotional efforts of a television station. She has lived her entire life in Johnson City. She has never lived in the proposed coverage area of Channel 8 and has

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[26] We discuss this particular Telecorp exception solely because, should the Commission — upon review — reduce the dispositive weight we perceive as accruing to WTVK (*see infra*), the matter of Telecorp's quantitative "integration" credit *could* have ultimate decisional impact. This is especially true in light of the exceptions directed to the "fulltime" credit the ALJ *did* award to another (20%) Telecorp principal, Ralph H. Boston, exceptions we firmly reject as being purely speculative. Additionally, we will not pass upon those exceptions demanding a "shadowing" issue against Telecorp. Without ruling, we believe that the ALJ's *Memorandum Opinion and Order*, FCC 83M-482, released February 9, 1982, correctly pointed out that the Commission previously considered and resolved this issue.

[27] *I. D.*, para. 210.

> never been involved in any civic or community activities in Knoxville. She has stated she has no intention of selling her house in Johnson City.

Nonetheless, as an applicant with no other media interests, and an 80% quantitative "integration" factor (a factor enhanced by personal attributes of the remaining 80% Telecorp principals), the ALJ found Telecorp to comparatively outrank all of its nearest rivals, *I. D.*, paras. 219–221, and awarded it the permit.

21. In its "limited" exceptions,[28] Telecorp contends[29]:

> Telecorp respectfully submits that the Presiding Judge's conclusion that Ms. Walker's proposal will not be effectuated is unsupported by *any* record evidence, constitutes sheer speculation, and constitutes error as a result.

It goes on to claim[30]:

> Telecorp respectfully submits that no adverse inference may be drawn based upon Ms. Walker's plans with respect to her home in Johnson City as indicated by her during cross-examination on March 28, 1983. Indeed, to conclude that, on the one hand, it is Ms. Walker who represents Telecorp's financial strength while concluding at the same time that she would somehow need to sell her home in order to effectuate her proposal, is illogical.

22. In practice, it lies with the applicant advancing an "integration" proposal to allay any serious questions which may bear upon likely effectuation of that proposal, despite strong circumstantial evidence raising inevasible doubts. Sometimes an applicant is successful in dispelling the serious doubts that have arisen. *See, e.g., Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586–589 (Rev. Bd. 1982)(restoring integration credit rejected by ALJ) (majority opinion), *recon. denied*, FCC 82R-77, released December 22, 1982, *aff'd*, FCC 83-415, released September 21, 1983 (Comm'n), *aff'd mem. sub nom. Blake-Potash Corp.* v. *FCC*, No. 83-2112 (D. C. Cir. filed April 26, 1985). Sometimes an applicant is, on the slant of the record, unpersuasive. *See, e.g., KIST Corp.*, 99 FCC 2d 173, 183 n. 22 (Rev. Bd. 1984), *modifed on other grounds*, FCC 85-512, released September 24, 1985 (Comm'n), *appeal pending sub nom. United American Telecasters, Inc.* v. *FCC*, Nos. 85-1663, *et al.* (D. C. Cir. filed October 15, 1985). And, as suggested by the court's accompanying memoran-

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[28] In general, of course, Telecorp supports the *I. D.*, save for the fact that it would further *discredit* various of the other competing applicants on this point or that.

[29] Telecorp Exceptions at 8.

[30] *Id.*, at 9.

dum in *Blake-Potash, supra,* "substantial evidence" on the question of the likelihood of the effectuation of a particular applicant's "integration" proposal may support, legally, either predictive judgment.[31]

23. Unless clear error is shown, it has been the Board's usual practice to yield to the sapience of *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), and to defer on such sensitive factual judgments to "an impartial, experienced examiner who has observed the witness and lived with the case . . . ." 340 U. S. at 496.[32] We will do so here, not because we find that Mrs. Walker was, necessarily, willfully dissembling when she bespoke of her hope to work "fulltime" at her applicant's Knoxville station. Indeed, her tentative intention may well be to completely uproot from her longtime Johnson City domicile, so as to become a "fulltime" television promotion director in Knoxville. But "good" intentions aside, the eventual question we must ponder is whether, by "substantial evidence" on this record, Mrs. Walker has shown herself as likely to effectuate — *in full* — her ambitious "integration" proposal in a manner that clearly warrants the important comparative credit that comes with personal management involvement. We regret to say that the surrounding facts and circumstances here give us insufficient confidence in the probability of the unqualified effectuation of Mrs. Walker's "integration" bid.[33] Or, conversely, we cannot find on this record

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[31] Concerning the agency's *Central Texas Broadcasting* decision on whether or not to grant "integration" credit to the winning applicant, the *Blake-Potash* court's attending memorandum stated: "Where substantial evidence supports both the ALJ and the agency, the agency's choice governs."

[32] *Compare Central Texas Broadcasting, supra,* where the Board majority found "clear error" in the ALJ's denial of "integration" credit to the eventual winner.

[33] Rather, we find ourselves largely in agreement with one of the opposing applicants, whose practical reservations we generally share:

> Mrs. Walker's intention not to sell her Johnson City home is relevant not to any question of her financial resources, but rather is one of a set of facts which, taken together, indicate a reluctance to commit herself to the integration proposal fully. That is, not only will it be difficult for her to leave her lifetime home, but Mrs. Walker's complete lack of civic ties to the Knoxville area and her station in life make her unlikely to perform her proposed role as promotion director. In light of these difficulties in carrying out her job, Mrs. Walker's lack of work experience, like her unwillingness to sell her Johnson City home, is more relevant to her intent than her ability to effectuate her proposal.

CCT Reply at 20. *See generally also KIST Corp., supra,* 99 FCC 2d at 183 n. 22, where we also withheld "fulltime" credit, in part because the key principal declined to commit to a complete relocation to the city in which the proposed station would be located. Here, apparently, Mrs. Walker would not even discuss the persuasive evidence with which to reliably reverse the considered conclusion of the presiding ALJ on this credibility judgment.[34]

Past Broadcast Record of WTVK

24. The *Policy Statement* expressly invites applicants with a prior broadcast background to attempt to seek credit through showings of either "previous broadcasting experience" or "past broadcast record," the distinction being that:

> Previous broadcasting experience includes activity which would not qualify as a past broadcast record, *i.e.*, where there was not ownership responsibility for a station's performance.

1 FCC 2d at 396. In almost every comparative licensing case, certain applicants are enhanced by the inclusion of one or more proposed managing principals with "previous broadcast experience," and appropriate enhancement of any "integration" credit is awarded for that former personal experience.[35] More rarely, however, do applicants in our licensing cases seek to gain additional comparative credit for any "past broadcast record," for reasons we pause, parenthetically, to explain more fully.

25. As the *Policy Statement* expressly provides, a licensee's "past broadcast record" can be "a factor of substantial importance" in our comparative selection process, though only if that record is "unusually good or unusually poor." 1 FCC 2d at 398. One of the pragmatic reasons for not more actively encouraging a routine comparative review of past broadcast records, to the extent not made clear in note[36] below, is this agency's inveterate

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the duration of any personal management commitment in Knoxville. CCT Reply at 20 (citing Tr. 987).

[34] We pause here to note that, based upon our overriding resolution of this unique case, Telecorp would not prevail over WTVK under the primary objective of "best practicable service" — of which ownership "integration" credit is but *one subcategory* — even if we were to reverse the ALJ and restore Mrs. Walker's 20% management "integration" credit. To that extent, the matter of Mrs. Walker's "integration" credit becomes — to the Board's overall analysis — far less critical than Telecorp apparently perceives. Indeed, *see supra* note 8, in which we find that Telecorp would yet prevail, irrespective of Mrs. Walker's "integration" credit, if WTVK were not otherwise our definitive choice.

[35] Reference to our most recent cases will affirm this routine practice. *See, e.g., Talleyrand Broadcasting*, 59 RR 2d 563, 566-567 (Rev. Bd. 1985); *Mark L. Wodlinger*, 101 FCC 2d 762, 771-772 (Rev. Bd. 1985); and *Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1615-1616 (Rev. Bd. 1985).

[36] The more complete explication of this policy factor states:

> We are interested in records which, because either unsually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the records show (i) unusual

reluctance to involve itself systematically in any particular broadcast licensee's individualistic programming choices. This engrained indisposition to peer over a broadcast licensee's shoulder at its autonomous programming choices is manifested earlier in the *Policy Statement* in the Commission's separate discussion of an applicant's "*proposed* program service." There, in the same fashion, the Commission has judiciously eschewed being drawn regularly into *comparative* programming evaluations as between competing applicants, a rating practice which would be both unavoidably subjective and uncomfortably close to the penumbra of the anticensorship provisions of Section 326 of the Communications Act (47 U.S.C. § 326). *See generally Policy Statement*, 1 FCC 2d at 397. In short, the *Policy Statement* makes translucent that, but for exceptional cases, our comparative licensing process should not be read by applicants or the public as an oblique "signal" of any *official* FCC programming preferences. In our distinctive system of broadcasting, such programming choices belong in the hands of responsibly licensed private parties and prudentially away from the all-too-deviable power of the state.[37]

26. Accordingly, to help assure that the government's superintending licensing authority does not — unless necessarily — step habitually into the supersensitive ambit of broadcast programming content,[38] our comparative licensing process has wittingly staked off such troublesome territory with the procedural *cordon sanitaire* of the "threshold showing." Thus, in the everyday comparative licensing case, a "past broadcast record" will not be accepted into record evidence unless an applicant seeking extra credit for its prior programming first motions for a separate

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attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to carry out representations made to the Commission (the fact that such representations have been carried out, however, does not lead to an affirmative preference for the applicant, since it is expected, as a matter of course, that a licensee will carry out representations made to the Commission).

1 FCC 2d at 398.

[37] *See generally FCC* v. *League of Women Voters of California*, 104 S. Ct. 3106, 3116 (1984) ("We have . . . made clear that broadcasters are engaged in a vital and *independent* form of communicative activity"); *see also FCC* v. *WNCN Listners Guild*, 450 U.S. 582 (1981).

[38] For reasons that need not here be discussed extensively, our "comparative renewal" process examines, first and foremost, the prior record of an incumbent licensee. *See Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D. C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983) (license renewal applicant with solid record entitled to statutory "renewal expectancy" as against competing applicant(s)).

comparative issue accompanied by a threshold evidentiary showing "of the unusual nature of a licensee's past broadcast record . . . ." *Gilbert Group, Inc.*, 49 RR 2d 1081, 1082 (1981).

27. However, we are here confronted with anything but the "everyday" comparative licensing case; it is in almost every significative sense "extraordinary," a situation fully and forthrightly anticipated by the Commission in the unprecedented VHF "drop-in" deliberations giving rise to this *sui generis* proceeding. *See VHF TV Top 100 Markets*, 63 FCC 2d 840 (1977) (and separate statements of individual Commissioners). That is, despite its acute awareness that new VHF "drop-ins" in certain mature television markets would run squarely perpendicular to its historic "UHF impact" policy, *see id.*, at 854-855, and notwithstanding its candid acknowledgement that — *in particular* — a Knoxville VHF "drop-in" would have a pronounced and potentially ruinous impact on UHF station WTVK,[39] the Commission eventually opted in favor of VHF "drop-in" in Knoxville as serving the larger public interest. *See Report and Order*, 81 FCC 2d 233 (1980), *recon. denied*, 90 FCC 2d 160 (1982), *aff'd sub nom. Springfield Television of Utah, Inc.* v. FCC, 710 F.2d 620 (10th Cir. 1983).

28. Throughout the Commission's extensive VHF "drop-in" proceedings, WTVK pleaded that, *if* a third VHF channel *were* to be made newly available in the long-established Knoxville broadcast market, its existing television station ought to be permitted to modify its present license (*see generally* 47 U.S.C. § 316) to reflect simply an intramarket frequency change from its current UHF Channel 26 to any newly allocated VHF Channel 8. *See, e.g., VHF TV Top 100 Markets, supra*, 63 FCC 2d at 882. But, the

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[39] The Commission there observed:

> 154. *Economic impact.* WTVK, the UHF ABC affiliate in Knoxville, currently achieves a relatively low share of the audience (12% of ADI hours, 9:00 a.m. to midnight, according to the February 1976 Arbitron Sweep). It is assumed therefore that the network would choose to affiliate with the new VHF station. With that assumption, the models available to us suggest that the UHF would presently have difficulty as a commercial independent station. However, by the 1985-1988 time period, two of the models suggest that Knoxville would support three commercial VHF affiliates and one commercial UHF independent. In the absence of the drop-in, the two models indicate that by 1985-88 the market would probably support a commercial UHF independent. The Besen-Hanly model suggests that a commercial UHF independent would not be likely with or without the drop-in. On balance the models seem to suggest that the drop-in would be a VHF replacement for a UHF affiliate, but would not preclude the existence of a UHF independent in the future.

63 FCC 2d at 881.

Commission rejected that course (*see id.*).[40] Yet, to considerably buffer the resultant blow to such as WTVK, the Commission — for reasons both practical and equiable — specially declared that it would affirmatively "consider [best] practicable service and past performance in any comparative hearing that may result" from any particular VHF "drop-in." 63 FCC 2d at 892. Accepting that prominent invitation, WTVK responsively proffered its evidentiary showing of its "past broadcast record," a performance record examined in some detail by the ALJ. *I. D.*, paras. 170-185.[41] However, as an incidental result of the ALJ's thoroughgoing rejection of WTVK's "integration" proposal for its General Manager, John D. Engelbrecht, *see supra* paras. 15-19, no consideration whatever was given to WTVK's impressive "past broadcast record" in the final comparative calculations of the ALJ's initial decision. *See I. D.*, para. 218. That omission was a transcendent misreckoning we must correct properly below.

29. As the instant hearing record reveals, WTVK has been owned and operated continuously by South Central Communications Corporation since 1954. As a very early pioneer UHF television station, no elaborate picture need be drawn of the unfavorable odds the station faced in grasping a viable commercial foothold in the very rugged geographical and economic terrain that confronted the fledgling Knoxville UHF station. *See, e.g.,*

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[40] WTVK continues this argument before the Board:

> The I. D. treated the application of South Central as if it were a proposal to establish new facilities in a new community of license, rather than as a proposal to modify its thirty year-old UHF television station to provide even better service within the community it knows and plainly has served well. From this essential flaw, the I. D. evaluated South Central's application without due regard for its past record of service to Knoxville . . . . . .

WTVK Exceptions at 6. The Board, of course, cannot overrule the Commission, *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720-21 (Comm'n 1966), and any argument over the prior rejection of WTVK's frequency modification argument is legally foreclosed.

We do note, for the record, that as early as 1962, WTVK sought its own "drop-in" of VHF Channel 8 so as to ameliorate its uncompetitive position, but — ironically — its modification request was rebuffed by the Commission in favor of *strengthening* UHF broadcasting. *See I. D.*, para. 176. The station again sought to modify its license to Channel 8 in 1975, but was — again — unsuccessful. *Id.*

[41] No party to this proceeding has excepted to the ALJ's consideration of WTVK's "past broadcast record," and any such potential exception would by now be waived. 47 C.F.R. § 1.277(a). And, given the Commission's express assurance that an existing UHF station's past performance would be considered in any comparative proceeding, any such exception would have been denied.

I. D., paras. 176–177. The attrition rate amongst any class of pioneers is always high, and early UHF television entrepreneurs were certainly no exception.[42] The ALJ observed[43]:

> Virtually from inception it has been one of only three operating commercial television stations assigned to Knoxville and during this period has operated as the only UHF station in competition with two VHF stations inthe market, WBIR-TV and WATE-TV. WTVK applications for renewal of license have been granted in the ordinary course from inception to date.

Further[44]:

> In 1976 the Commission found that WTVK "... currently achieves a relatively low share of the audience (12% of ADI Hours, 9:00 a.m. to midnight, according to the February 1976 Arbitron Sweep)." Its low rating is due in part to the fact that parts of the viewing audience were unable to receive any UHF signal because of the absence of UHF reception capability in their home sets.

And[45]:

> After years of operating losses, WTVK in 1973 experienced a net operating income before taxes of $12,258. The Commission's official summary of television financial data for that year reported total broadcast income for the three operating Knoxville television stations of $2,173,000. The Commission's official summary of financial data for the year 1980 reported total pre-tax broadcast income for the three operating commercial stations in Knoxville as $8,052,038. WTVK's part of such pre-tax broadcast operating income was $289,833.

30. Despite the fact that — as the third television station in the Knoxville market — WTVK has almost always been an affiliate of one or another of the three national networks,[46] it has always struggled in a far distant third position against its two strong VHF competitors. Taking nearly 20 years to achieve any operating profit at all, the station nonetheless began to gradually increase its Knoxville audience ratings share, which share still ranked it remotely below its two VHF television counterparts. Thus[47]:

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[42] *See generally VHF Top 100 Markets, supra*, 63 FCC 2d at 904 (Dissenting Statement of Comm'r Lee in which Comm'r Quello joined) (animadvertising to the Commission's VHF "drop-in" proposals as "The Stench").

[43] *I. D.*, at para. 170 (citations omitted).

[44] *I. D.*, at para. 171 (citations omitted).

[45] *I. D.*, at para. 172 (citations omitted).

[46] At almost all times, WTVK has had an annual network affiliation agreement. *See I.D.*, para 174. But, after 1965, it struggled along with ABC, which itself did not begin to achieve anything like ratings parity with CBS or NBC until the late 1970's. *See id.* For more on how ABC very slowly inched its way "from the back of the pack." See *Broadcasting*, February 13, 1978, at 39 *et seq.*

[47] *I.D.*, at para. 175 (citation omitted).

> Compared to its 12% share of Knoxville ADI Hours in 1976, noted previously, station WTVK had a 17% share thereof as of July, 1981. The balance was distributed between the two Knoxville VHF stations.

Or, obversely, WTVK's two Knoxville VHF competitors jointly controlled 83% of that market's television audience at the latest ratings period of record in this case. Insofar as revenue share, the hearing record observed that station WTVK's pre-tax broadcast income was, at that point, less than 1/20 of the three-station Knoxville television market total. It is against this technical and economic backdrop that we review the pertinent incidents of station WTVK's "past broadcast record."

31. The ALJ recorded, without rebuttal, that notwithstanding WTVK's becrippling UHF handicap, and — of course — the corresponding imbalance of operating revenues as compared to its two VHF competitors, station WTVK performed its public service obligations in a manner that not only belied its overwhelming technical and economic disadvantage, but — quantitatively speaking — actually outstripped (at times) its two Knoxville VHF competitors in certain key nonentertainment categories. For example, the ALJ noted[48]:

> The most recent FCC summary of television program data was released on December 15, 1980 for the year 1979. It reflects, *inter alia*, that 27.8% of WTVK's broadcast time (6 a.m. to midnight) was devoted to nonentertainment material compared to 22.4% for WATE-TV and 27.2% for WBIR-TV. WTVK broadcast 4.0% for public affairs during the prime time (6 p.m. — 11 p.m.) compared to 3.1% and 3.8% for WATE-TV and WBIR-TV respectively. WTVK exceeded, and in some cases was exceeded by, the Knoxville VHF stations in other quantitatively measured categories during the 1979 composite week as reported by the Commission.

Further, in the *Policy Statement's* more important *qualitative* encouragement of "attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs," 1 FCC 2d at 398, WTVK simply could not have had compiled a more commendable program record. Without reproducing the entirety of the ALJ's factual findings set forth in the *I.D.* at paras. 178–185, we hereinbelow attempt to convey the salient profile of WTVK's recent service record. Thus[49]:

> WTVK maintains a full-time news reporter exclusively at the Knoxville City Hall in connection with its purpose to report on all local government developments. Neither of the Knoxville VHF television stations maintains

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[48] *Id.*, at para. 183 (citations omitted).

[49] *Id.*, at para. 178 (citations omitted).

> a reporter exclusively at City Hall. WTVK was also the first market station to provide live coverage of local election activity and returns from remote locations throughout the area.

Additionally[50]:

> WTVK seeks to emphasize local events, problems and interests in all of its news programming. Virtually every newscast includes a discrete segment devoted to local matters, whether or not "breaking news," designed to inform the local viewers as to a host of developments in Knoxville and its environs.*** The record reflects a wide range of topics of local concern covered by WTVK during the period of August 1978 to August 1981.

And[51]:

> In addition to its emphasis upon local matters as an incident of its news programming, WTVK has presented programming on such matters apart from a news context.*** Having acquired in 1974 the first television remote production capability in the Knoxville market, Station WTVK undertook a special series of public affairs originations from outlying communities within the station's service area. Such originations involved on-site stays of multiple days' duration and were the first such programs undertaken by any of the Knoxville television stations.

Lastly, not only has station WTVK met (and exceeded) its news and public affairs promises made to the Commission in its periodic renewal applications, *I.D.*, para. 180, the ALJ more specifically found that "WTVK has sought to provide special programming and services in response to particular community requirements and interests." *Id.*, at para. 184 (illustrative examples provided). But, we need not here rely on summary characterizations: WTVK has supplied for the record a detailed, 64-page exhibit styled "Local Matters Coverage",[52] which exhibit daily journalizes for two-year period the noteworthy material broadcast by that station in direct response to its community's local needs and interests. This exhaustive exhibit conclusively establishes, far beyond our limited descriptive abilities, that station WTVK has fulfilled its fiduciary duty to the local community in a manner truly exemplary of the very finest in broadcasting.[53]

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[50] *Id.*, at para. 179 (citations omitted).

[51] *Id.*, at para. 181 (citations omitted).

[52] WTVK Exh. No. 6-D.

[53] We also acknowledge, and direct attention to, the extensive supplementary material provided in WTVK Exh. Nos. 6A-6F, which exhibits further document the enormous and innovative technical improvement program followed by WTVK over the years; its constant upgrading of its operational facilities; its regularly scheduled special programs relating to local public affairs; and its continuous efforts to timely disseminate programs responsive to the peculiar needs of the Knoxville market.

32. As if the foregoing evidence were insufficient to accord very substantial comparative credit to WTVK for its meritorious "past broadcast record," the evidence here also contains what the court has referred to as possibly the "*most reliable*" index of a given licensee's public interest record: its reputation and standing in the local community. *See Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 841–841 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756, 762 (D.C. Cir. 1983); *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503, 508 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1774 (1983). In that regard, WTVK proffered the testimonial statements of 24 recognized Knoxville community leaders, ranging from those of the Mayor, to the County Executive, to the Chamber of Commerce, to the Chancellor of the University of Tennessee, to charitable institutions (*e.g.*, United Way, American Heart Association, Easter Seal Society), to police officials, to a local "community action" group. *I.D.*, para. 185. The written testimony of this cross-section of leading Knoxville citizens is unanimous in its lofty praise of station WTVK's dedicated attention to that local community's special needs and interests[54]; and the record in this case is utterly devoid of any representations or suggestions to the contrary.

33. On the whole, then, and even if we outrightly ignore the severe UHF handicap under which this pioneer facility has labored since its very inauguration, we find that station WTVK has more than fully discharged the commonplace public interest responsibilities entrusted to it by the Commission. It has, in every material way, excelled in public service to its home community. When its obvious UHF handicap is, realistically, factored in, the station's past service record becomes all the more outstanding in terms of responsiveness to the indigenous needs and interests of its Knoxville audience. Although its success, in dollars and cents terms, has been rather meager, it has — by its highly meritorious local service — accrued for itself a cognizable surfeit of *public interest* capital, in return for which it is legitimately entitled to a very substantial preference under the Commission's "best practicable service" objective.[55]

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[54] *See* WTVK Exh. No. 6–F.

[55] To the extent that the cursory exceptions of CCT (Exceptions at 44–45) contend otherwise, they are conclusory, unsupported, and denied.

Conclusion

34. We prologize this decisive part of our review function with the blunt concession — one made at the very outset of this decision — that the extant law is preciously thin on the axial question of how, precisely, we are to justly compare the competing applications of hopeful newcomers as against that of an incumbent licensee with a traceable broadcast track record in the very community in which a new (and more desirable) commercial broadcast frequency becomes available.[56] In the most recent judicial commentary having certain analogous overtones, the Court of Appeals for the District of Columbia Circuit sharply overturned the Commission's comparative selection of a newcomer applicant over that of a local pioneer licensee in the competitive contest for a better AM radio frequency that had become newly available in the licensee's long-standing community of license. *See Miner* v. *FCC*, 663 F.2d 152 (D.C. Cir. 1980). We recognize that the flaw in the agency's reasoning most criticized by the *Miner* court was the Commission's *constructive* assessment of a "diversification" demerit against the incumbent broadcaster, who — like station WTVK here — sought merely to move from one local broadcast frequency to a better one in that very same community, while proposing — naturally — to simultaneously vacate its previously occupied local channel. We further acknowledge that, even in the wake of *Miner*, the basic law relating to these comparative "frequency upgrade" situations may not yet be crystalized into settled Commission policy. *See, e.g., Vactionland Broadcasting Company, Inc.*, FCC 861-003, releaed January 13, 1986. Still, we believe that it is both implicit and explicit from the tenor of the Commission's language and from the extraordinary circumstances explained in *VHF TV Top 100 Markets, supra*, 68 FCC 2d at 892, that, at the least, no residual "diversification" demerit should be here visited upon station WTVK, based solely upon its present occupancy of UHF Channel 26, a television channel it would eagerly vacate in exchange for the VHF "drop-in" frequency now available in Knoxville. To do otherwise, we feel, would not only create an entirely irrational "diversification" fiction, but it would also run gratingly counter to the practical and equitable concerns

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[56] We have been a long and difficult time sorting out the law's operative framework in the more common "comparative renewal" situation, *see e.g., Central Florida Enterprises, Inc.* v. *FCC*, 683 F. 2d 503 (D. C. Cir. 1982), *cert. denied*, 103 S. Ct. 1774 (1983)(and prior history), another vexatious area in which we must make a rational comparison between an incumbent licensee's "past broadcast record" and a newcomer's "paper promises."

voiced by the *Miner* court over the flawed "diversification" treatment accorded to the rejected incumbent in the *Miner* case.[57] Hence, no fictional "diversification" demerit will be assessed against station WTVK merely because of its present occupancy of Channel 26 in Knoxville.

35. In a similar vein, and inasmuch as the Commission has expressly conditioned any potential grant of VHF Channel 8 to station WTVK upon that licensee's parallel divestiture of its co-owned local radio station, WEZK(FM), Knoxville, *see Hearing Designation Order*, BC–511, released July 21, 1982, at 27, no constructive "diversification" demerit will be assessed in that connection either. None is justifiable because, should WTVK be awarded the new VHF television channel, that licensee would then, by operation of law, possess one — *and only one* — broadcast facility in the Knoxville Market: VHF Channel 8.[58] On the other hand, and because its present TV/FM radio combination in Knoxville is "grandfathered" under our prevailing multiple ownership rules, a grant of the new VHF frequency to the licensee of WTVK here — and the mandatory divestiture of its co-located FM radio station — would actually increase the total number of broadcast media voices available in that community, an incidental by-product which, to that extent, will correspondingly further our companion *Policy Statement* objective of a "maximum diffusion of control of the media." That much is certainly all to the good, and the resultant breakup of the TV/FM radio combine now held by the licensee of WTVK weighs, *pro tanto* on the positive side of an award to WTVK under our larger media diversification considerations.

36. We have now considered all decisionally significant exceptions in making our comparative evaluation of the applicants. Under the factor of "diversification of control," we are mostly in agreement with the findings in the *I.D.*, as summarized at paras. 202–206. However, unlike the ALJ, we have assessed no demerit against WTVK based on its current occupancy of UHF Channel 26, or for its present ownership interest of WEZK (FM), an interest it must mandatorily divest as a precondition to a VHF

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[57] The *Miner* court pointedly admonished that we simply must devise a much more equitable process for comparing the applications of an incumbent pioneer against a newcomer for a newly allocated channel in the pioneer's community oflicense. *See* 663 F.2d at 157.

[58] As a matter of law, a grant of Channel 8 to WTVK, would — in any event — *require* the timely divestiture of WEZK(FM) under the Commission's multiple ownership rules, 47 CFR § 73.3555, which rules prohibit any *new* VHF TV/radio co-ownership in the same broadcast market.

grant here. WTVK is awarded a relevant demerit, however, because of its ownership of an FM station in Nashville, Tennessee and in two other radio stations in Evansville, Indiana.[59] Thus, ETB, Le Conte, Telecorp, and Community, all of whom have no media interests, are awarded slight preferences over CCT, KBC, KTTV, HHS and TTI, to which latter applicants are attributed various out-of-state interests, and a slight-to-moderate preference over WTVK. With respect to "integration of ownership and management," we again concur with most of the ALJ's findings as set forth in paras. 207–218 of the *I.D.* We reverse, however, the ALJ's denial of any "integration" credit for WTVK's proposal of John D. Engelbrecht as its General Manager. For the reasons stated at paras. 15–19, *supra*, we hold that, at a minimum, Engelbrecht is entitled to "substantial" time "integration" credit. In sum, we find that the award of an 80% fulltime management factor to Telecorp gives it the edge in "integration" credit over its competing applicants (ranging from 31% to 80%), which quantitative advantage cannot be overcome by its competitors' various qualitative enhancements. *See Van Buren Community Service*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). Against these credits, we find that WTVK is entitled to a very substantial preference under "best practicable service." Balancing all of the myriad factors present in this exceedingly complex and unique case, we find that WTVK is the legally superior applicant under the comprehensive perspective commanded by the Commission's *Policy Statement*. Our selection of WTVK is explained further in the concluding paragraphs below.

37. It has long been recognized that a broadcaster's past service record stands perspicuously superior as a predictive harbinger. *See generally Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966). Or, as another court has put it:

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[59] At most, WTVK will be given a slight-to-moderate demerit *vis-a-vis* those applicants with no other media interests. WTVK's ownership of one in-state and two out-of-sate broadcast stations does not amount to a substantial demerit against it, because "the Commission's uniform tendency in the last 10 years has been to reserve substantial diversification preferences for situations in which the other applicants have in-town media interests . . . ." *Focus Television Co.*, 98 FCC 2d 546, 553 (Rev. Bd. 1984). *Compare Phoenix Media Corp.*, 56 RR 2d 1241 (Rev. Bd. 1984) (moderate preference — no media interests versus ownership interests in four in-state stations), *with Angeles Broadcasting Network*, 96 FCC 2d 5 (Rev. Bd.), *rev. denied*, FCC 84-495, released November 26, 1984 (Comm'n 1984) (slight-to-moderate demerit for two broadcast interest in nearby states).

> It would hardly be sensible to ignore the past, for it affords the 'best evidence' of . . . future performance.

Central Florida Enterprises, Inc. v. *FCC*, 598 F.2d 37, 43 (D.C. Cir. 1978). And, in comparative licensing cases where a choice of competing applicants must be made, the Commission has stated a shepherding principle which is all but apodictic:

> There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but *it might even deprive the community of an acceptable service and replace it with an inferior one.* *Victor Broadcastsing, Inc.* v. *FCC*, 722 F.2d 756, 762 (1983) (quoting *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1013 (1981) (subsequent history omitted)).

38. We are intensely aware that the case before us is *not* of the "comparative renewal" genre; regardless of its highly meritorius "past broadcast record," WTVK is here entitled to neither the competitive boost of a statutory "renewal expectancy", nor may it claim anything in the nature of an "improvement expectancy."[60] And yet, if the policy doctrine of favoring an incumbent licensee having a meritorious "past broadcast record" in the home community over the "paper promises" of a competing newcomer is logically sound in *one* comparative broadcast licensing context, it cannot be, *mutatis mutandis*, less rationally sound in another. In fact, the law is not at all otherwise, for the pre-eminent *Policy Statement* under which we are here instructed makes it luminously clear that, if the record evidence so warrants, an applicant's "past broadcast record" is "a factor of substantial importance" under one of our two primary licensing objectives: "best practicable service." *Policy Statement*, 1 FCC 2d at 396. In further fact, the Commission presciently anticipated that existing UHF stations in markets directly affected by any VHF "drop-in" decision might well establish their better entitlement to the new frequency in any subsequent comparative license proceeding. Accordingly, the agency very purposefully provided an even-

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[60] Indeed, the Board has previously rejected the claim that an incumbent television licensee seeking to move a "better" UHF channel in the same community is comparatively entitled to an "improvement expectancy." *Minneapolis Star & Tribune Co.*, 88 FCC 2d 1604, 1610 (Rev. Bd. 1982). *But cf. Implementation of B. C. Docket No. 80-90*, 101 FCC 2d 638 (1985) (increasing the number of "fulltime" AM radio stations in the U.S. and providing for "special comparative consideration" for local "daytime-only" AM stations wishing to upgrade locally to "fulltime" status), *clarified*, FCC 86-76, released February 21, 1986.

handed opportunity for any impacted UHF licensee to prove its superior comparative merit by the strength of its "past broadcast record" in that UHF licensee's home community. *VHF TV Top 100 Markets*, 68 FCC 2d at 892. By virtue of station WTVK's 30-year record of continuous and — from what the instant hearing record shows — exemplary service to the people of Knoxville, a quality of public service that may or may not be duplicated by a different licensee, we have determined that WTVK is entitled to a very substantial preference under the banausic licensing objective of "best practicable service." While certain other applicants are here favored — to a greater or lesser degree — under the other important Commission objective of "maximum diffusion of control" of the media, *see* 1 FCC 2d at 394, we are guided heavily in our final judgment by the applicable reasoning set forth in one of the earliest comparative cases conducted under our 1965 *Policy Statement*. In *Farragut Television Corp.*, 8 FCC 2d 279 (1967), the Commission was compelled to comparatively weigh the strong "diversification" preference due to one applicant for a Columbus, Ohio television station as against the mutually exclusive application of a competing applicant who already held licenses for both an AM and an FM radio station in that selfsame Columbus market. After considering that Columbus was already served by a goodly number of operational media outlets, the Commission ultimately preferred the application of the local AM/FM licensee for the new television station, because that incumbent licensee had "submitted a showing of many meritorious programs broadcast over [its] various stations." *Id.*, at 283. The Commission there declared:

> A record of past performance provides an indication of the quality of the performance which may be expected from a broadcaster in the future, and we emphasized the importance of this comparative criterion in the *Policy Statement*. Therein we stated that favorable consideration for past performance is merited where the broadcaster has demonstrated unusual attention to the public's needs and interests, such as special sensitivity to an area's needs through flexibility of local programs to meet those needs.

Id., at 283-284 (citation omitted). In language, perforce, apposite to our case at bar, the Columbus television construction permit was awarded to the *Farragut* applicant who — through its "past broadcast performance" in that very market — had palpably demonstrated the "vision and the ability to operate broadcast facilities in response to the current needs of the listeners, and to meet such needs by timely programs, on both a regular and a special basis . . ." *Id.*, at 284.[61]

39. In our instant case, the reasons for giving the final nod to the licensee of WTVK are — in addition to that discussed in note 61, below — a good deal more compelling, for the successful incumbent in *Farragut* was not at all confronted with the adverse consequences that would befall WTVK if a different applicant were to here co-opt the recently allocated VHF channel. That is, while the successful *Farragut* incumbent was appropriately rewarded for its past meritorious service in its own home market, a loss by WTVK in this case would mean not merely a failure to *reward* that station's indomitable efforts in Knoxville, but it would result, perversely, in an economic and regulatory *punishment* of devastating dimension,[62] thus violating the fundamental "reward/punishment" schema which pervades Communications Act, the *Policy Statement*, as well as our basal senses of bedrock justice. The law, the logic, and the manifest equities of this unprecendented case demand that the notable efforts of nearly 1/3 of a century, fought gainst grossly uneven opportunity, not be rent asunder by administrative *tour de force*. The licensee of station WTVK has acquired its surpassing entitlement to the new Knoxville VHF frequency the *hard* way: it has *earned* it. As for those parties whose competing applications are necessarily rebuffed by our grant of this VHF frequency to WTVK, the door of opportunity to television broadcasting in Knoxville still remains

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[61] In fact, WTVK's comparative posture is far better than that of the succesful local incumbent in *Farragut*, where the local incumbent prevailed over its competitor despite the fact that the incumbent possessed — and was permitted to *retain* — an AM/FM radio station combination in that same community. Here, on the other hand, a grant to WTVK will not add to, but will *reduce*, that licensee's media outlets in Knoxville as a result of its required divesture of station WEZK (FM). (*See supra* para. 35 and note 58).

[62] With the Knoxville VHF license will surely run WTVK's current network affiliation, a fact rather assumed with certainty by the Commission. *VHF TV Top 100 Markets, supra*, 68 FCC 2d at 881. This assumption is supported by the predicted fallout of our decision in *Central Alabama Broadcasters, Inc.*, 88 FCC 2d 1501 (1982), *aff'd*, FCC 83-210, released May 2, 1983 (Comm'n), *aff'd by judgment sub nom. WCOV, Inc. Montgomery Independent Telecasters, Inc.* v. *FCC*, No. 83-1557 (D.C. Cir. filed March 1, 1984). Therein, we predicted that allowing a Selma, Alabama VHF station to move its transmitter site so as to fully cover the larger Montgomery, Alabama market would mean the complete loss of the CBS network affiliation to the local UHF station, WCOV-TV. See 88 FCC 2d at 1516, 1526-1528.

As puddles follow the rain, UHF station WCOV-TV is no longer a CBS affiliate; that honor is now in the exclusive hands of the Selma VHF station whose relocated television signal completely embraces Montgomery as well. See *Televison Digest* Vol. 21 — No. 25 (May 27, 1985), at p. 4.

wide open by dint of station WTVK's coeval relinquishment of its Channel 26 slot. Though the path that station WTVK has broken for the past 30 long years is financially risky and operationally steep, there will always be those — such as South Central Communications Corp. in the early 1950's — intrepid enough to take an honest entrepreneurial chance on an available UHF television channel. And, perhaps succeed.

40. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by Citizens Community Television, Inc. on October 4, 1985 IS GRANTED and the Amendment IS ACCEPTED; that the petition to accept pleading *nunc pro tunc* filed by Knoxville Broadcasting Corp. on October 21, 1985 IS GRANTED; that the motions for leave to amend filed by Tennessee Telecorp, Inc. on November 1, 1985 and January 30, 1986 ARE GRANTED, and the amendments ARE ACCEPTED; and that the motion for leave to amend filed by South Central Communications Corporation on February 13, 1986 IS GRANTED, and the amendment IS ACCEPTED; and

41. IT IS FURTHER ORDERED, That the application of South Central Communications Corporation (File No. BPCT-810615LA) for authority to modify its license for UHF Station WTVK-TV, Channel 26 in Knoxville, Tennessee to specify operation on Channel 8 IS GRANTED, and the applications of Knoxville Broadcasting Corp. (File No. BPCT-810209KE), Community Broadcasters of Knoxville, Inc (File No. BPCT-810612KE), East Tennessee Broadcasting (File No. BPCT-810612KF), Tennessee Telecorp, Inc. (File No. BPCT-810615KG), Knoxville Tennessee T.V., Inc. (File No. BPCT-810615KM), Citizens Community Television, Inc. (File No. BPCT-810615KQ), Tennessee Telecasting, Inc. (File No. BPCT-810615KT), HHS, Inc. (File No. BPCT-810615KX), and Le Conte Broadcasting Company, Inc (File No. BPCT—810615KY) ARE DENIED.

42. IT IS FURTHER ORDERED, That the grant of South Central Communications Corporation's application is subject to the conditions set forth in paragraphs 21 and 27 of the *Hearing Designation Order*, Mimeo No. BC-511, released July 16, 1982.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 85D-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

KNOXVILLE BROADCASTING CORP. Knoxville, Tennessee	BC DOCKET NO. 82-382 File No. BPCT-810209KE
COMMUNITY BROADCASTERS OF KNOXVILLE, INC. Knoxville, Tennessee	BC DOCKET NO. 82-284 File No. BPCT-810612KE
EAST TENNESSEE BROADCASTING Knoxville, Tennessee	BC DOCKET NO. 82-385 File No. BPCT-810612KF
TENNESSEE TELECORP, INC. Knoxville, Tennessee	BC DOCKET NO. 82-386 File No. BPCT-810615KG
KNOXVILLE TENNESSEE T.V., INC. Knoxville, Tennessee	BC DOCKET NO. 82-388 File No. BPCT—810615KM
CITIZENS COMMUNITY TELEVISION, INC. Knoxville, Tennessee	BC DOCKET NO. 82-389 File No. BPCT-810615KG
TENNESSEE TELECASTING, INC. Maryville, Tennessee	BC DOCKET NO. 82-391 File No. BPCT-810615KT

HHS, INC. **Knoxville, Tennessee**	**BC DOCKET** **NO. 82-392** **File No.** **BPCT-810615KX**
LE CONTE BROADCASTING COMPANY, INC. **Knoxville, Tennessee**	**BC DOCKET** **NO. 82-393** **File No.** **BPCT-810615KY**
SOUTH CENTRAL COMMUNICATIONS CORPORATION **Knoxville, Tennessee (WTVK-TV)**	**BC DOCKET** **NO. 82-394** **File No.** **BPCT-810615LA**

For Construction Permit
for a New TV Station

Appearances

William Andrews and *Shelly Greene* on behalf of Knoxville Broadcasting Corp; *John H. Midlen, Jr.* on behalf of Community Broadcasters of Knoxville, Inc.; *Donald T. Bliss, David Dasef* and *John Beisner* on behalf of East Tennessee Broadcasting; *Rudolph L. Ennis* and *Robert Stone* on behalf of Tennessee Telecorp, Inc.; *John Feore* on behalf of Knoxville Tennessee T.V., Inc.; *Barry Wood* and *John Whatley* on behalf of Citizens Community Television, Inc.; *Richard Bodorff* and *David Oxenford* on behalf of Tennessee Telecasting, Inc.; *Donald J. Evans, Robert Rich* and *Thomas McCabe* on behalf of HHS, Inc.; *John L. Tierney* and *Richard Swift* on behalf of Le Conte Broadcasting Company, Inc.; *Edward S. O'Neill* and *David Frolio* on behalf of South Central Communications Corporation; and *Stephen Yelverton* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: August 27, 1985; Released: September 6, 1985

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Knoxville Broadcasting Corporation ("KBC"), Community

Broadcasters of Knoxville, Inc. ("Community"), East Tennessee Broadcasting ("ETB"), Tennessee Telecorp, Inc. ("Telecorp"), Knoxville Tennessee T.V., Inc. ("KTTV"), Citizens Community Television, Inc. ("Citizens"), Tennessee Telecasting, Inc. ("TTI"), HHS, Inc. ("HHS"), Le Conte Broadcasting Company, Inc. ("Le Conte"), and South Central Communications Corporation ("South Central") for authority to construct a new commercial VHF television station on Channel 8.[1] All but TTI propose Knoxville as the city of license. TTI has specified Maryville as the city of license. The applications were designated for consolidated hearing by the Chief of the Broadcast Bureau, acting pursuant to delegated authority of the Commission. *Hearing Designation Order*, BC-511, released July 21, 1982.

2. The following issues were specified for hearing:

1. To determine with respect to Johnson, Community, ETB, TTI and Le Conte, whether there is a reasonable possibility the tower height and location proposed by each would constitute a hazard to air navigation.
2. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would provide a fair, efficient and equitable distribution of television service.
3. In the event it is concluded from Issue 2, above, that a choice between applications should not be based solely on considerations relating to Section 307(b), to determine which proposals would on a comparative basis best serve the public interest.
4. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. The air hazard issue was resolved in favor of Community, Le Conte, TTI and ETB prior to the commencement of evidentiary hearings.[2]

4. The applications of Edward M. Johnson, Local Service Television, Inc. and Knoxmedia, Inc. were all dismissed with prejudice pursuant to their own requests.[3]

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[1] Channel 8 was allocated by Report and Order (FCC 80-505), 81 FCC 2d 233, 48 RR 2d 585 (1980), *recon. den.*, 90 FCC 2d 160, 51 RR 2d 959 (1982), *aff'd sub. nom., Springfield Television of Utah, Inc. v. FCC*, 710 F. 2d 620 (10th Cir. 1983).

[2] See *Order* 82M-2935 (released September 23, 1982); *Order* 82M-2936 (released September 23, 1982); *Order* 82M-2655 (released August 30, 1982); *Order* 82M-2279 (released October 23, 1982).

[3] See *Order* 83M-3812 (released October 25, 1983); *Order* 83M-3811 (released October 25, 1983); *Order* 83M-31 (released January 5, 1983).

5. The designated issues were enlarged to add a financial qualification issue against Community,[4] and a reporting issue and financial qualification issue against Citizens.[5] The financial issue against Citizens was subsequently resolved by Summary Decision.[6]

6. A prehearing conference was conducted in Washington, D.C. on September 16, 1982. An evidentiary hearing was conducted from March 28, 1983 to April 8, 1983 and reconvened on June 30, 1983 and July 28, 1983. Rebuttal sessions followed on March 27 and 28, 1984.

Findings of Fact

Section 307(b) Issue

7. All of the above named applicants but TTI have proposed Knoxville, Tennessee as their community of license. TTI has specified Maryville, Tennessee as its city of license and seeks a dispositive preference on that basis (TTI Ex. 1). TTI disavows any preference under Section 307(b) on the basis of reception (*Id.*; Tr. 1810).

8. Knoxville is the county seat of Knox County Tennessee. It is the center of a four county SMSA which includes Knox, Union, Anderson and Blount Counties.[7] Maryville is the county seat of Blount County (Citizens Ex. 6; Citizens Ex. 7). According to the 1980 Census, the populations of Knoxville and Maryville were 175,045 and 17,480, respectively. The Knoxville SMSA 1980 Census population was 476,517 (Citizens Ex. 6; Citizens Ex. 7).

9. The 1980 Census population of Blount County was 77,770 (Citizens Ex. 6). The population of Knox County was 319,695, an increase of 15.7% over the 1970 Census figure (Citizens Ex. 7). Knoxville has experienced in the past decade a trend toward suburbanization in both the northwest and to the south and southwest (Tr. 1772).

10. Total employment for the Knoxville SMSA in the second quarter of 1982 was 211,980 (Citizens Ex. 7). In the city of Knoxville itself, over 74,700 persons were employed in 1980 (*Id.*) The Labor force in Knox County rose 13.8% to 151,830 persons

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[4] *Order* 83M-3289 (released September 21, 1983).

[5] *Order* 83M-1325 (released April 21, 1983); *Order* 83M-3287 (released September 21, 1983).

[6] *Order* 83M-4270 (released November 23, 1983).

[7] The Metropolitan Statistical Area is a statistical category reflecting close economic and social relationships between central city and suburban areas (Citizens Ex. 6).

from 1978 to 1981 (Community Ex. 15, "Economic Statistics," p. 1).

11. The Knoxville Metropolitan Area enjoys a diverse employment base which includes the Union Carbide Nuclear Division (17,777 employees), The University ofTennessee (8,364 employees), The Tennessee Valley Authority (5,020 employees), the Aluminum Company of America (4,626 employees) (Citizens Ex. 7). Union Carbide's facility is located in Oak Ridge and the Aluminum Company of America is located in Alcoa (Tr. 1741). Alcoa is contiguous to Maryville (TTI Ex. 4).

12. The latest available study of commuting patterns between Knoxville and outlying counties was performed in 1970. At that time, 4,379 persons commuted from Blount County to the city. The total number of commuters to Knoxville from all counties other than Knox and Blount was 9.197 (Telecorp Ex. 7; Citizens Ex. 12). In 1970, commuters constituted over 12% of the Knox County workforce (Telecorp Ex. 7).

13. Knoxville lies at the junction of Interstate Highway I-40 and I-75 and is served by numerous means of transportation including two interstate bus lines and 37 truck lines. Knoxville is part of the interconnected inland water system, connecting it to New Orleans and all other ports of the Mississippi-Ohio River system (Citizens Ex. 7). Seven commercial airlines fly in and out of Knoxville's Magee-Tyson Airport, located in Blount County near Alcoa (*Id.*).

14. Knoxville is the cultural center for the region offering a ballet company, a repertory dance company, and a symphony orchestra. Touring plays, musicals and concerts are performed at Knoxville's Civic Coliseum (Citizens Ex. 7). Residents of Blount County come into Knoxville to attend performances at the Coliseum, to dine at restaurants and to attend the approximately 15 movie theaters in the city (Tr. 1765, 1775). Knoxville is the home of the University of Tennessee, whose enrollment exceeds 30,000 students. Also located in Knoxville are the Tennessee School for the Deaf and Knoxville College. University of Tennessee augments Knoxville's cultural scene by providing theater, dance, art galleries and libraries, as well as inter-collegiate sports (Citizens Ex. 7).

15. Nine standard (AM) broadcast stations, five operating (FM) stations and three commercial television stations (WATE-TV, WBIR-TV and WTVK) are licensed to Knoxville. A fourth station (WKCH-TV) has been granted a permit (TTI Ex. 1). Knoxville is

served by two daily newspapers, the *Knoxville Journal* and the *Knoxville News-Sentinel* (Citizens Ex. 7).

16. Maryville is included in the Knoxville urbanized area,[8] and lies approximately 15 miles from the center of the Knoxville Metropolitan area (Citizens Ex. 6). In 1982, Blount County joined the Knoxville Urban Area Metropolitan Planning Organization. The United States Department of Transportation requires such an organization to be formed in all cities with populations 50,000 or more in order to develop and implement a comprehensive transportation planning process (TTI Ex. 3; Citizens Ex. 6). Elected officials of Maryville, Alcoa and Blount County serve on the Executive Board of the Metropolitan Planning Organization and representatives of the same communities on the executive staff. The Planning Organization coordinates and approves all road improvements for Maryville that involves state or federal funding. These projects are published annually by the Knoxville-Knox County Metropolitan Planning Commission (Citizens Ex. 6).

17. The major artery between Maryville and Knoxville is the four lane U.S. Highway 129, known as the Alcoa Highway. U.S. 129 also connects Knoxville with its airport in Blount County, two miles from Maryville (Citizens Ex. 6). Modern commercial developments line Highway 129, including 11 auto dealerships, a shopping center, a private airport, an armory and a drive-in movie theater (TTI Ex. 4; Citizens Ex. 6; Tr. 1753, 1756 and 1757). In addition, residential developments not visible from the road due to steep hills line U.S. 129 on either side of the road in both Knox and Blount Counties (Tr. 1757–58, 1768–69). These areas are sufficiently densely populated to qualify for the transportation planning program. The University of Tennessee Medical Center is on U.S. 129 in Knox County, across the Tennessee River from Knoxville, and the University operates an agricultural experimental farm near part of the Highway (Tr. 1753–54).

18. U.S. 129 carries heavy traffic, particularly during the morning and evening rush hours when Alcoa employees living in Knoxville and Blount County or residents attending school in Knoxville make their commute. The 1982 Adjusted Traffic Count at the Knox-Blount County line was 30,730 average daily trips (Citizens Ex. 6). Blount County residents are also drawn to Knoxville by the social and recreational opportunities of the city

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[8] The Census Bureau defines an "urbanized area" as the "physically continuously built-up territory around each larger city and thus corresponds generally to the core of high and medium population density at the heart of the metropolitan area" (Citizens Ex. 6, Appendix A, p. 1).

(Tr. 1765). Additionally, the sale of liquor is prohibited in Blount County whereas in Knox County it is permitted (*Id.*).

19. A new shopping mall, only the second in Blount County, has recently opened outside the Maryville city limits and is expected to draw shoppers from Knoxville and Knox County (TTI, Ex. 2; Tr. 1775). Maryville has regular daily bus service to Knoxville. It has no intra-city bus service. The nearest rail service is in Knoxville (Citizens Ex. 6).

20. A full-time AM radio station WGAP is licensed to Maryville. AM radio station WEAG is licensed to contiguous Alcoa[9] (TTI Ex. 1). Maryville receives the Knoxville commercial television stations and enjoys numerous other radio reception services (Citizens Ex. 6). Maryville is also served by a local daily newspaper, *The Maryville-Alcoa Times* (*Id.*).

Section 73.3514 and Section 1.65 Issue (Citizens Community Television, Inc.)

21. Citizens was incorporated in 1980 in order to apply for Channel 8. Its initial stockholders were Thomas L. Moore, George H. Thompson and Anne B. Wilde (Citizens Ex. 26).

22. In 1979, Mr. Thompson acquired a 25% interest in a trust which held 11.11% of the stock of Media South, Inc., a broadcasting company, and he was elected to the Media South's board of directors (Citizens Ex. 27). In 1980, Mr. Thompson, transferred his entire interest in Media South to a trustee and resigned from the board of directors (*Id.*). This transfer was reported to the Commission (*Id.*). In January 1982, after Citizens had filed its Channel 8 application, Mr. Thompson re-acquired his one-quarter interest in the trust that held 11.11% of the stock of Media South (*Id.*; Tr. 2924). He did so by assuming personal liability on a note on which the Media South trust was the borrower (Citizens Ex. 27). Mr. Thompson was not elected to any position with Media South, took no part in its operation, and understood that the trustee had the responsibility for voting the stock held by the trust (*Id.*).

23. It was not until September 28, 1982, however, that Citizens petitioned to amend its application to report Mr. Thompson's re-acquisition of his indirect interest in Media South (*See* Citizens Amendment filed September 28, 1982). And that amendment also indicated his intention to divest that small holding (Le Conte Ex.

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[9] WEAG call letters have been changed to WMDR. *New or Modified Broadcasting Signals*, Report No. 875, Mimeo No. 5171, released July 2, 1984.

10, attachment 1). This interest was sold November 29, 1982 (Citizens Ex. 27; Telecorp Ex. 15) and this transaction was reported in Citizens amendment filed November 20, 1982. Mr. Thompson alleges that his re-acquisition of his indirect interest in Media South was timely reported because he believed that such a small, passive interest could have no effect on Citizens comparative standing (Citizens Ex. 27). It is alleged that it was not until September 1982, when he had a conversation with Citizens' attorney that Mr. Thompson learned that his interest in Media South should be reported in this proceeding (*Id.*).

24. In early 1982, Mr. Thompson participated in the formation of a corporation named The Black Coalition for Media Diversity, Inc. ("BCMD"), which had filed applications for 64 low power television stations throughout the country (Citizens Ex. 27). Mr. Thompson was president and director of the BCMD, as well as a 51% stockholder (Tr. 2928). Mr. Thompson made a no cash contribution to the BCMD beyond some minor out of pocket expenses (Tr. 2961).

25. After formation of the BCMD, its LPTV project was left in the hands of a consultant who in May of 1982 filed the LPTV applications on behalf of the BCMD (Citizens Ex. 27). Mr. Thompson did not sign the BCMD applications, nor does he know who did (Tr. 1610–11). Mr. Thompson did not receive copies of the filed applications (Tr. 2957).

26. It wasn't until after an inquiry by Citizens' counsel in September of 1982 that Mr. Thompson investigated the BCMD applications. A list of the applications was compiled and Citizens submitted an amendment to its application to reflect that Mr. Thompson's participation in the BCMD (Citizens Ex. 27). Mr. Thompson disassociated himself from the BCMD in November 1982 and his shares were redeemed by the corporation (*Id.*). Mr. Thompson's disassociation from the BCMD was reported in an amendment on November 30, 1982, wherein it was also reported that Mr. Thompson's brother's (Clyde Thompson) ownership interest rose from 17% to 34.7% (*Id.*).

27. Thomas L. Moore has been a stockholder and member of the board of C&C Bank of Knox County since 1972 (Tr. 1528). This was not reported until after other applicants had discovered it during a deposition (Citizens Ex. 26).

28. Mr. Moore had substantial ownership interests in as well as being officer and director of Mirus, Inc. since 1981, a firm providing security services, and College Pharmacy in Knoxville

(Tr. 1486). This was first reported to the FCC in the December 22, 1982 amendment.

29. At the hearing, Mr. Moore testified that he received a letter attached to the application from Nationwide Communications, Inc. relative to a proposed joint television antenna tower from Don E. Watkins, vice president engineering of Nationwide Communications, Inc. (Tr. 2816, 2850). However, following the production of an affidavit of Mr. Watkins (Telecorp Ex. 24). He admitted that he had not actually received that portion of Citizens original application purporting to be a letter from Mr. Watkins addressed to him personally (Tr. 2854-56). Subsequently, in an affidavit Mr. Ron Hammontree, Citizens incorporator and consultant, stated that he had personally spoken with Mr. Watkin's secretary who suggested that Mr. Moore's name could be substituted for his name on the Nationwide Communications letter (Motion to Strike Ex. 8 at 4). Telecorp responded with the affidavit of Mr. Watkins' secretary which flatly denied any such thing (Opposition to Motion to Strike/Response to Rebuttal Showing filed July 9, 1984).

Financial Qualification of Community

30. Community's projected cost to construct Channel 8 and operate it for the first three months are estimated at $2,784,936 (Community Ex. 15). Of this amount $2,231,061 is for equipment and is to be financed through deferred credit from the equipment manufacturer (*Id.*). The balance is to be secured from other sources (*Id.*).

31. In support of its financial qualification, Community relies on a purported commitment from Supreme Mortgage Company, Inc., of Indianapolis, Indiana (Supreme) to arrange a loan in the amount of $5,775,000 (Community Ex. 17). As evidence of that commitment, Community provided a letter dated August 27, 1981 signed by a Dr. Roy M. Walker, secretary/treasurer of Supreme (Id. at 8). However, Dr. Roy Walker testified that he had advised Community in the "the fall of 1982" that the terms of Supreme's August 27, 1981 letter would not be operative (Tr. 2652).[10]

32. Between the fall of 1982 and a point several days before the resumption of the hearing on March 27, 1984, Community had no genuine financial plan (Tr. 2652-53). Not until several days before

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[10] Dr. Walker testified that he did not deem the August 27, 1981 letter to be a legally binding agreement because his name had been signed to the letter without his authorization by a former Supreme employee (Tr. 2631-34; 2646-47).

the hearing resumed to consider the Community financial issue did Dale Alan Richman, Community's president, Dr. Walker and Community's counsel begin efforts to fill the $2,000,000 cash void in Community's budget (Tr. 2653-54). As explained by Dr. Walker, the three men devised a general concept for financing the $2,000,000 substantially different from that originally outlined in Community's application and discussed in Supreme's August 27, 1981 letter (Tr. 2652-54). Under the new concept, Supreme would locate a pension group with $5,775,000 available for investment, would arrange for a transfer of those funds to the Bank of Clearwater (Florida) and the bank would in turn issue interest-bearing certificates of deposit to the pension group (Tr. 2659-61, 2663-64). Community would then approach the Bank of Clearwater and apply for a loan in the amount of $5,775,000 the same amount deposited by the pension group (Tr. 2667). In so doing, Community would have to go through a normal loan application process with the Bank of Clearwater, demonstrating the availability of the requisite collateral and signing a negotiable promissory note to the bank (Tr. 2669-70).[11] If the Bank of Clearwater agreed to make a $5,775,000 loan, Community would retain $2,000,000 of the loan proceeds to satisfy Channel 8 construction and operation budget and the remaining $3,775,000 would be used to purchase from Western Reserve Life Insurance Company a five year annuity in the amount of $5,775,000[12] (Tr. 2676-77).

33. In sum, Community's new idea for securing $2,000,000 in cash involves three steps: (1) transfer of $5,775,000 in pension group money through Supreme to the Bank of Clearwater; (2) the Bank of Clearwater loaning $5,775,000 to Community and (3) Community's use of $3,775,000 of the loan proceeds to purchase a five year annuity from Western Reserve Life Insurance Company. No significant arrangements to accomplish any of these steps have been made.

34. First no pension group has committed to transfer funds to The Bank of Clearwater. Dr. Walker testified that he had not

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[11] Dr. Walker testified that if the Bank of Clearwater made the $5,775,000 loan, Community would pay Supreme a one-time 1% service charge ($57,750) for having arranged the transfer of funds from the pension groups to the Bank of Clearwater (Tr. 2671). In addition, Community would be obliged to pay the pension fund an annual fee of one-fourth of 1% of the $5,775,000 amount (or $13,937.50 per year) (Tr. 2672-73).

[12] In other words, the annuity would be in five years make available to Community an amount adequate to repay the principal on its $5,775,000 loan from the Bank of Clearwater (Tr. 2676-77).

even contacted any pension fund administrator concerning the possible transferring of funds on behalf of Community (Tr. 2694). Further, Dr. Walker testified that Supreme would not arrange any transfer of funds to The Bank of Clearwater until the bank had indicated an intention to accept the funds and to make a loan to Community-events which had not occurred (Tr. 2687–88, 2719; 2767–68).

35. Secondly, Community is yet to receive a loan commitment from The Bank of Clearwater. Both Dr. Walker and Mr. Richman testified that neither they nor anyone related with the Community application has even spoken with The Bank of Clearwater to determine the likelihood that a loan would be made (Tr. 2670, 2672, 2731–32). On cross-examination, Mr. Richman conceded that The Bank of Clearwater has never told Community that a bank loan would be made available, that he did not know what interest rate or security provisions The Bank of Clearwater would demand, and that he does not know of the details for any other arrangements The Bank of Clearwater would require in making a $5,775,000 loan (Tr. 2768). Mr. Richman further admitted that no bank had provided Community with any written indication of willingness to provide Community with a loan (Tr. 2734). And Dr. Walker raised questions whether any bank would give Community a loan since even after Channel 8 was constructed, Community would have no real property available for collateral[13] (Tr. 2688–89).

36. Finally, the record contains no assurance that the annuity is available. Western Reserve Life Insurance Company indicated by letter dated March 26, 1984 that it would provide Community with a $5,775,000 annuity due in five years in exchange for a payment of $3,775,000 (Tr. 2676–77). However, by the terms of the letter Western Reserve's offer expired on March 28, 1984 and the record does not show that Community purchased the annuity or made any concrete arrangements to do so.

Contingent Comparative Issue

Knoxville Broadcasting Corporation

37. Knoxville Broadcasting Corpoation ("KBC") is a corporation organized under the laws of the State of Tennessee for the

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[13] Dr. Walker testified that for "primary collateral," a bank probably would want "real estate" (*Id.*). Community, however, has no immediate plans to purchase any real estate with the $2 million cash it would receive (Tr. 2771). Meanwhile, RCA will hold a lien on all station equipment, rendering it unavailable as primary collateral (Tr. 2689).

purpose of seeking a construction permit to operate a television broadcast station on Channel 8 in Knoxville (KBC Ex. 1).

38. The Corporation has two classes of common stock: Class A and Class B. The holders of Class B stock have the same rights, privileges and preferences as the holders of Class A stock except that Class B shareholders have no voting rights (*Id.*).

39. The Class A shareholders are all members of the Board of Directors of KBC (*Id.*). Their respective offices and voting interests are as follows (*Id.*):

Party	*Office*	*$ of Interest*
J. Hugh Branson	Chairman of the Board; President	17.50
John D. Lockridge, Jr.	Treasurer; Director	8.25
Ann Gordon Dempster Smallman	Vice President; Director	8.25
Kenneth S. Needman	Director	8.25
Sam B. Newman	Director	8.25
Ernest Almer Curtis, Jr.	Director	8.25
Raymond A. Shirley, Sr.	Secretary; Director	8.25
James S. Bush	Director	8.25
Eugene L. Joyce	Director	8.25
Avon W. Rollins	Director	8.25
Charles A. Frazier	Director	8.25

40. The Class B shareholders are: Richard A. Colbert; Herman Pease; Harvey Seslowsky and Leslie Z. Toban (*Id.*).

41. Pursuant to the KBC shareholders' agreement, Class B shareholders do not have a right of approval with respect to the decisions of the Board of Directors; nor are the Class B shareholders empowered to participate in the day-to-day operation or affairs of the station (Tr. 70, 96). No Class B shareholder has participated in any discussion of broadcasting related business matters but the Class A shareholders (Tr. 60, 62, 103, 139).

42. Mr. Colbert, a non-voting Class B shareholder is resident, Chairman of the Board of Directors and 100% stockholder of Colbert Television Syndication Services, Inc., a Los Angeles based television program syndication company (KBC Ex. 4, revised). Mr. Colbert is also Chairman of the Board and part owner of Century City Television Syndication, Inc., another Los Angeles based television program syndication company.

43. Colbert Television Syndication Services, Inc. and Century City Television Syndication, Inc. hold shares of stock of the following mass media companies (*Id.*):

Name	*Amount of Shares*
Capital Cities	1,000
MGM	1,000
Orion Pictures	1,000
Tele-Pictures	10,000
Xiacon	1,000
Mycrodyne	1,000

44. The stock in these companies is legally owned by City National Bank of Beverly Hills, California, the trust which manages the pension plans of Colbert Television Syndication Services, Inc. and Century City Television Syndication, Inc. The stock is beneficially owned jointly by the plan's participants. Consequently, no specific number of shares can be attributed to Mr. Colbert or any individual participant. The stock of these companies is voted by the companies' pension planning committees, composed of the directors of the companies' boards. Mr. Colbert and his sons are directors of both companies (*Id.*).

45. Mr. Colbert personally owns 1,000 shares of stock of Orion Pictures and 4,000 shares of Tele-Pictures. His ownership interest in each company represent no more than 1% of the issued stock (*Id.*).

46. Herman Pease, a non-voting Class B stockholder, is the president, treasurer and 52% stockholder in White Haven Entertainment Corp., licensee of television station WVTV, Buffalo, New York. Mr. Pease is also vice president, director and 41% stockholder of HHL Broadcasting, Inc. an applicant for construction permit for a new television station to operate on Channel 612 at Wilmington, Delaware (*Id.*).[14]

47. Harvey Seslowsky, a non-voting Class B shareholder, is vice president, director and 15% stockholder of Filmways Communications of Syracuse, Inc., permittee of a construction permit for a new television station to operate on Channel 43 at Syracuse, New York. Mr. Seslowsky is also vice president, director and 15% stockholder of Filmways Communications Corporation, which holds an option for 30% of the permittee for a new television station to operate on Channel 23 at Albany, New York (*Id.*). In addition, Mr. Seslowsky is a director, secretary-treasurer and 49% stockholder of HHL Broadcasting, Inc.

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[14] The application of HHL Broadcasting, Inc. has since been dismissed.

48. Since 1970, Mr. Seslowsky has been the president and director of Broadcast Information Bureau, a publishing company in Syosset, New York which publishes source books containing film and cartoon availabilities and a magazine containing facts and figures about the television industry. Mr. Seslowsky is vice president and director of Film Service Corp., a television programming consulting firm in Salt Lake City, Utah and president, director and 100% owner of Media Merchandising Corp., a merchandising and consulting business in East Norwich, New York. Mr. Seslowsky is also president and director of National Video Clearinghouse, Inc., Syosset, New York a firm which serves as sales agent to video producers as well as publishes sales catalogues and information on video technology (*Id.*).

49. Mr. Seslowsky also owns 5,057 shares of MGM common stock and 3,000 shares of NTA common stock. Neither of these interests represents more than 1% of the issued stock of the companies (*Id.*).

50. Leslie Z. Toban, a non-voting Class B shareholder, is the president and director and 10% stockholder of HHL Broadcasting, Inc. (*Id.*).

51. Mr. Ernest Curtis, Jr., a voting 8.25% shareholder, currently owns 12 shares of Taft Broadcasting — less than 1% of the corporations' issued common stock (*Id.*).

52. Sam Newman, a voting 8.25% shareholder, is president, chief executive officer and 75% stockholder of Davis-Newman-Payne, an advertising agency in Knoxville, Tennessee (*Id.*).

53. Mr. J. Hugh Branson, a voting 17.5% shareholder and chairman of the board of KBC, will be the full-time general manager of the station (KBC Ex. 1; Tr. 97, 100). He will devote 40 hours or more per week to the station in this capacity (KBC Ex. 3). Upon a grant of the application Mr. Branson will move to Knoxville, Tennessee (*Id.*).

54. Mr. Branson attended the University of Tennessee from 1949 to 1953. While a student Mr. Branson was employed by WKGN-AM, Knoxville as an announcer. He also worked as a newscaster for WUOT, The University of Tennessee FM station (KBC Ex. 2).

55. From 1957 to 1965, Mr. Branson was employed by South Central Broadcasting Corp., licensee of WTVK-TV, Knoxville as a director of promotion and public affairs (*Id.*).

56. From 1967 to 1979, Mr. Branson served as administrative assistant to United States Senator Howard Baker of Tennessee. Currently, Mr. Branson is the sole owner of Hugh Branson and

Associates, a consulting firm in Washington, D.C. Mr. Branson has co-produced a television program on the life of George Cukor (*Id.*).

57. Ernest A. Curtis, Jr., owner of 8.25% of the voting stock of KBC, will serve as the station manager. He will devote full-time, 40 or more hours per week (KBC Ex. 3).

58. Mr. Curtis is a resident of Knoxville, Tennessee and currently is general manager at WSJK-TV, a non-commercial station licensed to the Tennessee State Board of Education, and he has held that position for approximately 15 years (KBC Ex. 2(d); Tr. 104).

59. Mr. Curtis is a member of the United Fund Television and Radio Committee and vice president of the Knoxville Musicians Association, The American Federation of Musicians, Local 546. Mr. Curtis is past potentate of the Kerbella Shrine Temple and currently serves as that organization's treasurer. He also serves as the entertainment director for the Tennessee Valley Fair and consultant to the Dogwood Arts Festival (KBC Ex. 2(d)).

60. Charles A. Frazier, owner of 8.25% of the voting stock of KBC, will serve as the stations production manager. He will devote full-time (40 or more hours per week) to that position. Mr. Frazier currently resides in Strawberry Plains, Tennessee, a town within the city grade contour of KBC's proposed station (KBC Ex. 3).

61. Mr. Frazier is producer/director for WSJK-TV, licensed to the Tennessee State Board of Education, (KBC Ex. 2(c)). Mr. Frazier has worked continuously for WSJK since 1973 (Tr. 118). From 1973 until 1975 he was the camera operator for the station (Tr. 113); he became producer/director in 1975 (Tr. 113). Mr. Frazier also spent a short period in 1977 as a part-time news reporter for WGVK-TV (Tr. 112).

62. Mr. Frazier, a Black male, is a member of the Knoxville NAACP and past president of the High Top Community Club. He has also been the sole owner of Frazier's East Barbecue in Knoxville since 1977 (KBC Ex. 2(c)).

63. Raymond A. Shirley, Sr., owner of 8.25% of the voting stock in KBC, will serve as the station's chief engineer. Mr. Shirley will devote full-time (40 or more hours per week) to that station (Tr. 171). Mr. Shirley currently resides in Knoxville (KBC Ex. 3).

64. Mr. Shirley is currently Assistant Vice President — Media, State-Wide Continuing Education in the Department of Broadcasting Services at the University of Tennessee (KBC Ex. 2(b)).

Mr. Shirley joined the department in 1956, and, since that time, has served as chief engineer of WUOT(FM) as well as assistant director and associate director of the broadcasting department (KBC Ex. 2(b)). Prior to his association with the University of Tennessee, Mr. Shirley was chief engineer for WLIK in Newport, Tennessee, WGIC(AM) and WGIC(FM) in Lenior City, Tennessee and WEAW(AM) and WEAW(FM) in Crossville, Tennessee (KBC Ex. 2(b)).

65. Mr. Shirley is active at the University of Tennessee in Knoxville as a sponsor of the University's Christian Student Center and as a member of the University's Five Hundred Club (KBC Ex. 2(b)).

66. Ann Gordon Dempster Smallman, owner of 8.25% of the voting stock of KBC, will serve as the station's community affairs director. She will work part-time (at least 20 hours per week) in that position. Ms. Smallman currently resides in Knoxville (KBC Ex. 3).

67. Currently, Ms. Smallman serves as a director of the following organizations: The Foundation Council of Fort Sanders Hospital, The Girls Club Honorary Board, The Florence Crittendan Honorary Board, the East Tennessee Presentation Society, and the City of Knoxville Industrial Development Board. Ms. Smallman is also Vice President Hospitality of the Knoxville Opera Company and Second Vice President of the Blount County Mansion Association. She is a member of the building committee and finance committee for a new building construction for St. Johns Episcopal Church (KBC Ex. 2(e)). Ms. Smallman is a past member of several similar educational, charitable and business organizations. She has no past broadcast experience (Tr. 126).

68. Avon Rollins owner of 8.25% of the voting stock and a Black-American will help produce and moderate a weekly public affairs program dealing with community issues. In addition, he will produce a periodical education television program (KBC Ex. 5).

69. John Lockridge a owner of 8.25% of the voting stock will produce and moderate a weekly public affairs call-in talk show dealing with community issues (KBC Ex. 5). However, neither Rollins nor Lockridge have made any time commitment concerning their respective proposed activities.

Community Broadcasters of Knoxville, Inc.

70. Community is a non-profit, non-stock corporation organized under the laws of The State of Tennessee (Community Ex. 1).

Community has received an Internal Revenue Service determination that it is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code (Community Ex. 16). No benefit from the corporation may inure to any individual, including members of the board, except in the form of reasonable compensation for services performed (Community Ex. 1).

71. Community's board of directors is composed of seven individuals: Dale Alan Richman, Cheryl Ann Richman, Aneta Carter-Cobb, Della Sue Collins, Anna Jane Battershell, Michael Battershell and Steven F. Smith. Dale Richman is also Community's president. Mr. Battershell is its treasurer and Mrs. Richman is the corporation's secretary (Community Ex. 4, 6, 7). Of the seven member board, three are female, of whom one is Black (Community Ex. 2, p. 2).

72. An eighth director, John L. Settles, resigned from Community's board of directors on February 15, 1982, after the "B" cut-off date (Community Ex. 2, Le Conte Ex. 8). On February 15, 1982, Mr. Settles executed a letter prepared and presented to him by Mr. Richman, stating that he was resigning his position with Community "for medical reasons" (Tr. 664). At his deposition, Mr. Richman acknowledged that he had inserted the reference to medical problems in the letter as "an easy way out of the situation" for Mr. Settles, and that he had not been aware of any medical problems when the two men discussed resignation (Tr. 669). At the hearing, however, Mr. Richman recanted his earlier statement and claimed that he had been aware of Mr. Settle's "mental aberrations" (Tr. 660). Mr. Richman had heard that Mr. Settles had been charged, or was alleged to have been charged, with public drunkenness (Tr. 584–585, 649), indecent exposure (Tr. 585), and passing bad checks (Tr. 589) and, that he had been incarcerated (Tr. 649). Accordingly, Mr. Richman determined that Community would benefit from his resignation (Tr. 577, 645).

73. In fact, Mr. Richman admitted that he had suggested to Mr. Settles that he resign because of Mr. Settles' personal problems (Tr. 668). Mr. Richman never revealed during the deposition that Mr. Settles was in the Knoxville Jail when his resignation had been obtained. To the contrary, he testified at the deposition in response to specific questioning that Mr. Settles' detention had occured at some time in Asheville (Tr. 651–52). At the hearing, for the very first time, Mr. Richman revealed that he presented Mr. Settles with the resignation letter in the Knoxville jail. Mr. Richman explained his failure to inform the other applicants that one of the directors of Community was in the

Knoxville Jail by saying he had "forgotten" or "overlooked" that crucial fact (Tr. 656). Mr. Richman conceded that he had received the transcript of his deposition and had attested to its accuracy (Tr. 656).

74. Several members of Community's board of directors propose to work at Community's proposed station. Dale Alan Richman proposes to serve as general manager, devoting 40 hours or more per week to that position (Community Ex. 2). He resides in Seymour, Tennessee which is approximately 12 miles from the city of Knoxville (Community Ex. 4). Mr. Richman has resided in the Knoxville area for approximately 5 years (*Id.*). Mr. Richman presently is a special student at the University of Tennessee in Knoxville (*Id.*).

75. Mr. Richman has had a long series of broadcasting-related jobs. From June 1971 through September 1972, he was a producer-director at WHP-TV, Harrisburg, Pennsylvania (Community Ex. 4). From 1972 through May 1973 he was production manager at KTVH-TV in Wichita, Kansas (*Id.*). Also in 1973 he worked for an independent production house in Miami, Florida (*Id.*). From March 1974 through February 1975 he was a television operations manager for J&R Advertising and Production in Hollywood, Florida (*Id.*). From January through June 1976, Mr. Richman was employed as creative service director at WSPA-TV, Spartanburg, South Carolina (*Id.*). From June to December 1976 he was director of broadcast operations at WGGS, Greenville, South Carolina (*Id.*). Finally, from January through June 1977, Mr. Richman was employed as general manager at KPAZ-TV, Phoenix, Arizona (*Id.*).

76. Mr. Richman is a member of the Board of Directors of the East Tennessee Chapter of the National Conference of Christian and Jews (Community Ex. 4). He also is a director of the Knoxville Chapter of the Full Gospel Businessmans Fellowship International (*Id.*).

77. Steven Fulton Smith is proposed as a part-time director of engineering for Community's station (Community Ex. 2). he has been a resident of Knoxville since 1969, and he is presently employed by Union Carbide Corporation at its Oak Ridge (Tennessee) Gaseous Diffusion Plant (Community Ex. 5). In addition, Mr. Smith is president, a director and 25% owner of Alpha-Omega Engineering, Inc., a recently formed corporation that proposes to manufacture electronic equipment (*Id.*).

78. Mr. Smith was an operations engineer at the WSJK(TV), Knoxville from 1974 to 1977 (Community Ex. 5).

79. Mr. Smith's direct testimony suggests that he may work 20 hours or more per week as Community's part-time director of engineering (Community Ex. 5, p. 1). However, Mr. Richman, Community's president and proposed general manager testified that Mr. Smith has not committed to work a specific number of hours each week at the station (Tr. 430-31). Although Mr. Smith has stated that in all likelihood he will not be employed by Union Carbide at the time the construction permit is issued (Community Ex. 5) he has made no commitment to leave or curtail his Union Carbide job or his involvement with Alpha-Omega Engineering.

80. Mr. Smith's proposed director of engineering position is not managerial in nature. Both Mr. Richman and Mr. Smith testified that as director of engineering, Mr. Smith would not supervise any employees at Community's proposed station, not even Community's proposed full-time chief engineer (Tr. 435, 563-68). Further, Mr. Smith conceded that his function at the proposed station is intended to be one of an advisory role in terms of purchasing equipment (Tr. 428).

81. Mr. Michael Battershell proposes to be the full-time chief engineer at Community's station devoting 40 hours per week to that position (Community Ex. 6). He has lived in Knox County Tennessee since 1945 (*Id.*). Mr. Battershell presently is employed by the University of Tennessee as the assistant chief engineer of the Department of Television Services, working primarily with the University's closed circuit television facility (*Id.*).

82. Mr. Battershell claims involvement in one civic activity. He has held several positions with a Parent Teacher Association (Community Ex. 6).

83. Cheryl Ann Richman proposes to be full-time program and operations manager at Community's station (Community Ex. 7). Mrs. Richman resides with her husband in Seymour, Tennessee (*Id.*). She is presently employed as a speech and language therapist in the Sevier County Public Schools (*Id.* p. 2). Mrs. Richman claims neither broadcasting experience nor involvement in any civic activities in Community's proposed service area.

84. Mrs. Richman proposes to devote 40 hours or more per week to her program and operations manager position (Community Ex. 2). She will resign her current employment upon grant of license (Community Ex. 7).

85. Della Sue Collins proposes to be the full-time public affairs director of Community's station (Community Ex. 8, p. 1). She has resided in Knoxville or Knox County for a number of years and presently is self employed, conducting seminars through Della Sue

Collins Ministries, Inc. (*Id.*). From 1965 to 1975, Ms. Collins was an actress and model who appeared in commercials (*Id.* p. 2).

86. Ms. Collins served as the executive director of the National Conference of Christian and Jews for the East Tennessee area from 1980 to 1983 (Community Ex. 8). She has been a member of the board of directors of the Knox County Council of Aging, (1980-1983 and the Knoxville United Ministries, 1982 to Present (*Id.* p. 4). Ms. Collins proposes to devote 40 or more hours per week to her public affairs director position (Community Ex. 2). This position will not be managerial in nature. Ms. Collins allowed that as a public affairs director she would not supervise any of the staff at the station (Tr. 395). Mr. Richman, Community's president and general manager, confirmed that Ms. Collins will have no supervisory responsibilities (Tr. 435, 63-68).

87. Anna Jane Battershell proposes to be the full-time director of communications at Community's station (Community Ex. 9, p. 1). She like her husband is a life long resident of Knoxville (*Id.*). Mrs. Battershell claims no broadcast experience.

88. Mrs. Battershell has been a member of a Parent Teacher Association, a member of the Joy Women Fellowship and 700 Club Counselor (Community Ex. 9).

89. Mrs. Battershell proposes to devote 40 or more hours per week to being director of communications (Community Ex. 2), a position not managerial in nature. Mrs. Battershell admitted that she was uncertain of what being director of communications would entail (Tr. 487-489). The explanation she was able to give however indicates that the job will primarily involve providing personal counselling to persons entirely unrelated to the station (Tr. 476-78). Mr. Richman, Community's president and proposed general manager has testified that as director of communications, Mrs. Battershell will not supervise any station employees (Tr. 563-68).

90. Aneta Carter-Cobb proposes to be full-time news director at Community's station (Community Ex. 10). She has lived in Knoxville from 1965-69 and from 1971 to present (*Id.*). She presently is employed as a counselor at Child and Family Services in Knoxville, a Social Services Agency (*Id.*). Mrs. Carter-Cobb claims no broadcast experience.

91. Mrs. Cater-Cobb was a project director for Women in Community Service from 1977-1983. She is on the board of directors of Midway Rehabilitation Center in Knoxville; a member of the Delta-Sigma Bata Sorority (Knoxville Chapter); a member

of Jack and Jill of America (a community educational organization for children); a member of the National Association of Social Workers; and a member of Phyllis Wheatly YWCA Advisory Board (Community Ex. 10).

92. Mrs. Carter-Cobb proposes to devote 40 or more hours per week to her news director position (Community Ex. 10). Mrs. Carter-Cobb was not originally proposed to be the news director of Community's proposed station (Community Ex. 2). That position was to have been filled by Mr. John Settles one of the original aid Community directors. Mr. Settles resigned from Community on February 15, 1982 (See Le Conte Ex. 8; Community Ex. 2). It appears that Mr. Settles resigned at the request of Mr. Richman at a time when Mr. Settles was incarcerated (Tr. 520, 553, 596–99, 656).

East Tennessee Broadcasting

93. East Tennessee Broadcasting (ETB) is a partnership organized under Tennessee law (ETB Ex. 1). The ETB principals are all general partners who will participate in station affairs (Tr. 723, 728, 730, 775, 791, 793, 797). They are:

Partner	*% of Ownership*
Ann Baker Furrow	14.4%
Jane Grams	10.0%
Walter S. E. Hardy, MD	7.2%
Robert H. Harvey, ED.D	7.2%
Herbert H. Howard, PH.D	3.6%
James R. Martin	14.4%
Cowan Rodgers, III	14.4%
Berneeze A. Ward	7.2%
Lee L. Williams, MD	7.2%
H. Pat Wood	14.4%

94. The ETB partners include two women (Mrs. Grams and Mrs. Furrow) and four Black males (Messrs. Hardy, Harvey, Ward and Williams) (*Id.*). ETB now seeks to claim 56.8% full-time integration of six partners (all except Messrs. Williams, Hardy, Martin and Wood) (ETB Ex. 4). ETB also now proposes Messrs. Martin, Hardy and Wood for part-time integration (*Id.*). As of the "B" cut-off date, at which time the comparative positions of the applicants were to be stabilized, ETB proposed the full-time integration of only Mrs. Furrow and Mrs. Grams, for a total of only 24.4%. At that time, ETB also specifically proposed Messrs. Harvey, Howard and Martin for part-time participation ("in excess of twenty hours per week"). It stated that Messrs.

Rodgers and Wood could have limited duty as members of an advisory group. (Proposed Station Management, Amendment filed August 31, 1981). ETB made no proposal regarding the three other partners. ETB later confirmed in response to an interrogatory that the application as then amended constituted its integration proposal (KBC Ex. 9).

95. Neither ETB or any of its partners have any interests, direct or indirect in any broadcast stations or other existing media of mass communications[15] (ETB Ex. 3).

96. Ann Baker Furrow, 14.4% owner of ETB, will work full-time at ETB's station as public affairs director and as a member of the programming committee (ETB Ex. 4, p. 3). She is a lifelong resident of the Knoxville area and has lived in Knoxville since 1967 (ETB Ex. 2A). She will devote 40 hours per week in her role as public affairs director and as member of the programming committee (ETB Ex. 4).

97. Mrs. Furrow has been active in civic endeavors. She served as the first woman member of the Board of Trustees of the University of Tennessee (ETB Ex. 2A). She also serves on the board governing the University of Tennessee Memorial Hospital and Research Center and on the monitoring committee of Desegregation of Higher Education in Tennessee (*Id.*). In addition, she has served and held office for Multiple Sclerosis Society, the Knoxville Symphony Board and the Dogwood Arts Festival. Currently she is Cub Scout Leader, a Sunday School Teacher and a recreational basketball coach (*Id.*).

98. Jane Grams, 10% owner of ETB, will be the full-time general manager of ETB's station and will devote at least 50 hours per week (ETB Ex. 4). She has resided in the Knoxville area since 1932 (ETB Ex. 2A and 2B).

99. Mrs. Grams' experience in broadcasting began in 1951 with WGAP in Maryville, Tennessee (ETB Ex. 2B). She was general manager of WSM-TV from January 1953 until October 1955 (*Id.*). She also worked as media director with Nobel Dury and Associates (a national advertising agency) and Showbiz, a syndicator of country music television programming of which she was president and co-owner. In March 1975 she became vice president and general manager of WTVC Channel 9 in Chattanooga, Tennessee. She was elected president and general manager of WTVC in July of 1977 and served until October 1980 (*Id.*). From April 1981

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[15] Dr. Herbert H. Howard owns a nominal amount (less than $\frac{1}{10}$th of 1% in each case) of certain publicly traded companied with communications interests (ETB Ex. 3).

through June 1981 she worked with Russell Rowe Communications on the development and design of the television facility in Macon, Georgia. Since December 1982, she has been working as a marketing specialist with Multimedia program productions in Nashville (*Id.*). Mrs. Grams plans to move to Knoxville upon grant of license (*Id.*).

100. Dr. Walter S.E. Hardy, 7.2% owner of ETB will be assistant public affairs director of ETB's station (ETB Ex. 4, p. 3). He has resided in Knoxville, Tennessee almost all of his life (ETB Ex. 2C). Dr. Hardy has been a practicing physician in Knoxville since 1951 (*Id.*).

101. Dr. Hardy will devote in excess of 20 hours per week to his assistant public affairs director position (ETB Ex. 4, p. 3). In this role he will plan public service programs and news speeches and will perform on-air work (ETB Ex. 2C). He is presently reducing his medical practice and civic activities so as to have ample time to devote to ETB's proposed station (ETB Ex. 2C; Tr. 820). Dr. Hardy has served as member, director and or officer of many civic and charitable organizations of the Knoxville area (ETB Ex. 2C).

102. Dr. Robert H. Harvey, 7.2% owner of ETB, will work full-time at ETB's station as a member of the programming committee and perform related management functions (ETB Ex. 4). He is a Black American and has resided in Knoxville since 1951 (ETB Ex. 2D).

103. Dr. Harvey has been on the faculty of Knoxville College since 1951 (ETB Ex. 2D). In addition to his activities at Knoxville College, Dr. Harvey has been involved in many other civic activities (ETB Ex. 2D).

104. Dr. Harvey will also serve as liaison between the station's programming department and the station's sales and business areas (ETB Ex. 4). It is alleged that he will be identifying special time sales opportunities, dealing with sales department needs for certain types of programs, initiating sales related promotions and developing programming budgets (*Id.*). He is curtailing his administrative responsibilities at Knoxville College and will reduce his other activities as necessary to fulfill his duties at ETB's proposed station (Tr. 820).

105. Herbert H. Howard, Ph.D., 3.6% owner of ETB, will work full-time at ETB's station as chairman of the programming committee (ETB Ex. 4). Dr. Howard has lived in East Tennessee all his life residing in Knoxville for the past 23 years (ETB Ex. 2E).

106. Dr. Howard has been teaching at the University of Tennessee at Knoxville since 1959, specializing in broadcast management and programming (ETB Ex. 2E). He presently is the schools' assistant dean for graduate studies and research in the department of broadcasting (*Id.*). Dr. Howard has been active in a number of civic activities (ETB Ex. 2E).

107. Dr. Howard worked as a part-time announcer for WJHL in Johnson City, Tennessee at age 16 (ETB Ex. 2E). He became a full-time announcer at WJHL in 1951 and program director in 1955 and worked in that capacity until 1958 (*Id.*). In 1958–1959, Dr. Howard worked as a part-time writer/announcer for WCHL radio in Chapel Hill, North Carolina and as a newscaster for WUNC–TV public television station of the University of North Carolina (*Id.*). In 1959–1962 he was part-time announcer for WNOX radio in Knoxville and served as executive assistant for Tennessee Association of Broadcasters from 1966 to 1973 (*Id.*).

108. As chairman of the programming committee, Dr. Howard will have day-to-day responsibility for the development and supervision of all aspects of the station's program fare from local, syndicated and other sources (ETB Ex. 4). He will also supervise all personnel in the proposed program department (*Id.*). Dr. Howard plans to relinquish his current administrative duties and reduce his teaching load at the University of Tennessee as necessary so that he may work full-time at ETB's proposed station (Tr. 813–14).

109. James R. Martin, 14.4% owner of ETB, will be the executive committee chairman for ETB's proposed station (ETB Ex. 4). He has resided in Knoxville since 1975 (ETB Ex. 2F). Mr. Martin plans to devote an excess of 20 hours per week (ETB Ex. 4) and among other things, in consultation with the general manager, he will be responsible for the station's budgeting, and financial planning and development (*Id.*).

110. Mr. Martin has engaged in many civic activities in the Knoxville area such as the Knoxville Symphony Society, Knoxville Chamber of Commerce, Knoxville Arts Council, Business Trust for the Arts, Junior Achievement of Greater Knoxville, Knoxville Red Cross, the United Way, Rotary Club (ETB Ex. 2F). He also serves on the board of trustees of Knoxville College and is a member of the Episcopal Church of the Ascension in Knoxville (ETB Ex. 2F).

111. Cowan Rodgers, III, 14.4% owner of ETB, will be the full-time local sales manager for ETB station (ETB Ex. 4). He's been a lifelong resident of Knoxville (ETB Ex. 2G). Mr. Rodgers

plans to devote at least 40 hours per week to the proposed station (ETB Ex. 4). Currently he is the owner of a Knoxville automobile dealership (ETB Ex. 2G). Mr. Rodgers is also credited with the active participation in many civic activities in the Knoxville area (ETB Ex. 2G).

112. Berneeze A. Ward, a 7.2% owner of ETB, will be the full-time public service director of ETB's station (ETB Ex. 4). He will devote a minimum of 40 hours per week (*Id.*). In his assigned role he will manage the proposed station's public service activities (*Id.*). He will serve as an official liaison between the station and its proposed service area, particularly the minority elements thereof (*Id.*). Mr. Ward is Black-American and has been a Knoxville resident for more than 40 years (ETB Ex. 2H). Mr. Ward is retired but has worked for the Tennessee Valley Authority, most recently as supervisor of Building Services (ETB Ex. 2H). Mr. Ward is credited with the active participation of many civic activities in the Knoxville area (ETB Ex. 2H).

113. Dr. Lee L. Williams, 7.2% owner of ETB plans to devote some time to station affairs. He is a lifelong resident of Knoxville and has practiced medicine there since August 1946. He is a Black-American (ETB Ex. 21). He is credited with the active participation in numerous civic activities in the Knoxville community (ETB Ex. 21).

114. H. Pat Wood, 14.4% owner of ETB will be the business manager of ETB's station (ETB Ex. 4). He is a lifelong resident of Knoxville and currently is engaged in real estate activities in the Knoxville area (ETB Ex. 2J, p. 1). Mr. Wood plans to devote an excess of 20 hours per week (ETB Ex. 4, p. 5). Mr. Wood is credited with the active participation in various civic activities in the Knoxville community (ETB Ex. 2J).

Tennessee Telecorp, Inc.

115. Tennessee Telecorp, Inc. (Telecorp) is a Tennessee corporation. Its stockholders are (Telecorp Ex. 1):

Name	*Position*	*No. of Shares*	*% of Ownership*
Donald K. Bagwell	President/Director	50	20
Lewis F. Cosby, III	Vice President/ Treasurer/Director	50	20
Sue Carr Walker	Vice President/Director	50	20

Name	*Position*	*No. of Shares*	*% of Ownership*
Ralph H. Boston	Vice President/Director	50	20
Earl R. Taylor	Vice President/ Secretary/Director	50	20

116. Neither Telecorp nor any of its officers, directors or shareholders have any interest direct or indirect in any existing medium of mass communications. Telecorp's exclusive business is devoted to the prosecution of its application for Knoxville, Channel 8 (*Id.*).

117. Donald K. Bagwell, president, director and 20% stockholder of Telecorp is proposed as the full-time station manager/news director of Telecorp's proposed station (Telecorp Ex. 2). He has resided in Knoxville, Tennessee since 1979. He resided in Johnson City, Tennessee from 1965 through 1972 (*Id.*).

118. His present employment is the manager of Information Services Tennessee Valley Authority, a position he will terminate when it becomes time to effectuate the integration proposal (*Id.*). From 1977 to 1979, Mr. Bagwell served as special assistant to Senator James R. Sasser, producing radio and television programs featuring interviews with Senator Sasser (*Id.*). From 1968 to 1972, Mr. Bagwell was announcer, news editor and director of news and public affairs at the WJHL-TV, Johnson City, Tennessee. Prior to that he worked at stations WETB, Johnson City, WQOK, Greenville, South Carolina, WOHS, Shelby, North Carolina and WFIS, Mountain Inn, South Carolina (*Id.*). From 1972 to 1973, Mr. Bagwell worked for the University of Missouri producing, directing documentary films, public service announcements, news films and special projects (*Id.*).

119. Mr. Bagwell seeks credit for civic activities based on the following: Faragut Home Owners Council, President 1981-1982; Smoky Mountain Sail Club, Member 1981 to present; American Diabetes Association, Board of Directors, Member of State Wide Fund Raising Committee, Committee for Reorganization of Knoxville Chapter, 1982 to present; Eastern State Hospital, Knoxville, Board of Advisors, 1971-1972; Committee on Drug Education of Johnson City, Tennessee, Vice Chairman, 1971-1972; Lions Club of Johnson City, Tennessee, President, 1971-1972; and Kappa Alpha Order, Johnson City, Tennessee, Member, 1966 to present (*Id.*).

120. Lewis F. Cosby, III, vice president, treasurer, director and 20% stockholder of Telecorp is the proposed full-time general manager/business manager of Telecorp's proposed station (*Id.*). Mr. Cosby has resided in Knoxville, Tennessee since 1979 and also while attending the University of Tennessee from 1969 to 1972. He resided in Johnson City, Tennessee from 1950 to 1969 and 1972 to 1974. His present employment is a certified public accountant, a position he will terminate at the start of the operation of the proposed station (*Id.*).

121. From 1969 to 1972, Mr. Cosby was employed by WJHL-TV, Johnson City, Tennessee as a reporter and photographer. Work was performed during the summers of 1970 and 1971 and during holidays and breaks from school (*Id.*). Mr. Cosby seek credit for civic and professional activities which include the following: Volunteers of America, Inc. of Knoxville-Director, Chairman, Audit Committee, Board of Directors, 1982 to present; Phi Gamma Delta, University of Tennessee, Knoxville, Member 1969 to present and Board of Advisors, 1982 to present; West Knoxville Jaycees, Member 1981 to present; Tennessee Society of Certified Public Accountants, Member, 1980 to present; Georgia Society of Certified Public Accountants, Member 1976 and 1979; Member of State Wide Committee on Governmental Accounting, 1978; American Institute of Certified Public Accountants, Member 1974 to present and Association of Governmental Accountants, Member, 1981 to present (*Id.*).

122. Sue Carr Walker, Vice President, Director, and 20% stockholder of Telecorp is the proposed full-time promotion director of Telecorp's proposed station. It is alleged that as promotion director she will coordinate and supervise the promotion and marketing efforts of the station in all media. She will supervise public relations work performed by outside agency and promote the public image of the proposed station through advertising and promotion efforts along with other management level personnel (Telecorp Ex. 4). She has no experience in broadcasting, nor has ever held a job (Tr. 974, 979). Ms. Walker is a lifelong resident (59 yrs.) of Johnson City, Tennessee (Telecorp Ex. 1, 4) but plans to move to Knoxville in the event of a grant (Telecorp Ex. 4). She does not intend to sell her home. Ms. Walker has engaged in many civic activities in the Johnson City areas (outside the proposed service area) since 1948 not only as member but also as officer and a director (*Id.*). She first became aware of the Channel 8 application when her son suggested it as an

investment opportunity (Tr. 974). Ms. Walker has loaned the corporation more money than any other stockholder (Tr. 926, 963, 977) and is the only Telecorp principal who paid solely cash as consideration for the issued stock (Tr. 878–79, 951), whereas the other Telecorp principals each paid two-thirds of the stock price in services (Tr. 878–79).

123. Earl R. Taylor, Vice President, Secretary, Director and 20% stockholder of Telecorp is proposed as the full-time sales manager/program director of Telecorp's proposed station (Telecorp Ex. 5). Mr. Taylor is a resident of Johnson City, Tennessee but plans to move to Knoxville in the event of a grant (Telecorp Ex. 1, 5). Mr. Taylor seeks credit for civic activities based on the following participation: Chairman of the Election Commission Washington County, Tennessee, 1977 to 1980; Member of Phi Gamma Delta at the University of Tennessee, 1968 to present; Johnson City Country Club, Member 1977 to present; American Bar Association, Member 1975 to 1979; and Washington County Bar Association, 1975 to present (Telecorp Ex. 5).

124. Ralph H. Boston, Vice President, Director, and 20% stockholder of Telecorp is proposed as the full-time director of public affairs/sports director of Telecorp's proposed station (Telecorp Ex. 6). Mr. Boston is a Black-American and has resided in Knoxville since 1968. Mr. Boston is an account executive with South Central Bell, but will resign from that position when Telecorp's proposed station commences operation (Telecorp Ex. 6). Mr. Boston also is a sports commentator for the entertainment and sports programming network (ESPN), a position he has held since 1980, but will terminate it no later than when Telecorp's proposed station commences operation (*Id.*). Mr. Boston also served as a sports commentator for Marvin H. Sugarman, Inc., producer of CBS Sports Spectacular for the CBS Television Network, 1969 to 1977 (*Id.*). Mr. Boston has served as Vice President of the National Alumni Association of Tennessee State University, 1982 to present; as Chairperson for Tony Wilson Memorial Fund in Knoxville, 1973 to 1975; as an Advisor to the Afro American Student Liberation Force, 1968 to 1975 and as an Advisor to the Liberation Concert Choir, 1968 to 1975.

Knoxville Tennessee TV, Inc.

125. Knoxville Tennessee Tv, Inc. (KTTV) is a Delaware Corporation authorized to issue 1600 shares of common stock (KTTV Ex. 1). At present, 800 shares have been issued, all of which are held by Malcolm I. Glazer (*Id.*). Mr. Glazer has

subscribed for 16 additional shares and his son Kevin Glazer has subscribed for 784 shares (*Id.*). The officers, directors and shareholders are as follows:

Name	*Office*	*No. of Shares*	*% of Ownership*
Malcom I. Glazer	President/Director	316	51
Carl Brasley	Secretary/Treasurer		
Avram Glazer	Vice President		
Kevin Glazer	Vice President	784	49

126. Malcom Glazer has interests in a number of mass communication businesses. He is the president and director of Illiana Telecasting Corporation, licensee of WTWO-TV, Terre Haute, Indiana. Mr. Glazer is also president, director and 100% owner of Fabri Development Corporation which owns all the stock of Illiana Telecasting Corporation (*Id.*).

127. Mr. Glazer is president and director of Elba Development Corporation which is licensee of KQTV(TV), St. Joseph, Missouri. Fabri Development Corporation is also the 100% owner of Elba Development Corporation (*Id.*). Mr. Glazer is also the president and director of Columbus Broadcasting Company, Inc. licensee of WRBL(TV), Columbus, Georgia. He is the president, director and 100% owner of Avant Development Corporation which owns all the stock of Columbus Broadcasting Company, Inc. (KTTV Ex. 3). Mr. Malcom Glazer is president and director of New Orleans Channel 20, Inc. permittee of WULT-TV in New Orleans, Louisiana (BAPCT-821217KS). Mr. Glazer is the president, director and 100% owner of Mutual Communications Corporation, 80% owner of New Orleans Channel 20, Inc. (Amendment July 26, 1983). Mr. Glazer is also the president, director and 100% owner of T.V. America Corporation, permittee of new low power television station in Terre Haute, Indiana (*Id.*).

128. Kevin Glazer, vice president and 49% owner is the proposed full-time general manager (KTTV Ex. 2). He will relocate to Knoxville if KTTV's application is granted (Tr. 2449). Mr. Kevin Glazer presently is a student at Ithaca College in Ithaca, New York (Tr. 2448-49). He also serves as the assistant vice president of Columbus Broadcasting Company, Inc. (Amendment July 26, 1983).

129. Carl Brasley has no ownership interest in any of the above mentioned corporations but he is secretary/treasurer of Elba Development Corporation, secretary/treasurer of Fabri Development Corporation, assistant secretary and director of Illiana

Telecasting Corporation, secretary/treasurer and director of Columbus Broadcasting Company, Inc., secretary/treasurer of Avant Development Corporation, secretary/treasurer and director of New Orleans Channel 20, Inc. and Mutual Company Communications Corp., secretary/treasurer of T.V. American Corporation.

130. Avram Glazer is assistant vice president of Columbus Broadcasting Company, Inc. and vice president and 49% owner of Salt Lake City Utah TV, Inc. an applicant for a construction permit (KTTV Ex. 2).

Citizens Community Television, Inc.

131. Citizens Community Television, Inc. (Citizens) is a Tennessee corporation. Its officers, directors and stockholders are (Citizens Ex. 1):

Name	*Office*	*% of Interest*
Thomas L. Moore	President/Director	800 shares (50%)
Anne B. Wilde	Secretary/Treasurer Director	200 shares (14%)
George H. Thompson	Vice President/ Director	400 shares (29%)

132. In an amendment dated August 9, 1984, Citizens reported the issuance of 2,000 shares of new non-voting stock, and the conversion of 600 shares of previously unissued stock to non-voting stock. The 2,000 shares of non-voting stock are held as follows: Thomas L. Moore — 630; George Thompson — 186.82; Anne B. Wilde — 383.18; Barcott Corporation — 1,400.

133. The August 9, 1984 amendment reported that the Barcott Corporation is a Tennessee corporation wholly-owned by Ronald Scott who also serves as its sole director. The officers of Barcott are: Ronald Scott — Chairman, President; Barbara Scott — Secretary; David Nelson — Executive Vide President; Ronald Keal — Executive Vice President; Lynn Wagner — Assistant Secretary.

134. Thomas L. Moore, president and majority shareholder of Citizens is proposed as the full-time general manager (Citizens Ex. 2). Mr. Moore has lived in Knoxville since 1945. From 1970 to last year, Mr. Moore was president, chairman of the board, and sole shareholder of TAM, Inc., a corporation which provides construction, food and custodial services under contract (Citizens Ex. 2). Mr. Moore resigned as president on March 13, 1984 (Citizens Ex. 33). TAM has participated in the United States Government Small Business Administration Section 8(a) Program. Under Section 8(a) the government sets aside particular job contracts for

participating minority businesses (Tr. 1238–41). TAM's contracts with the government required that Mr. Moore spend all of his time with TAM (Tr. 1233–34, 1240). The goal of the Section 8(a) program is to graduate its participants after they reach a sufficient level of ability that enables them to bid competitively (Tr. 1240). Mr. Moore testified that he would graduate from the SBA upon receipt of the license herein (Tr. 1343). However, Mr. Moore has never informed the SBA, which administers the contract program, of his proposed employment at the television station (Tr. 1246, 1260–61). As it happened, TAM, Inc. graduated from the SBA Section 8(a) contracting program as of October 7, 1983 (Citizens Ex. 29). Mr. Moore testified that the term "graduation" simply meant the end of the firm's participation in the program and that the "graduation" took place despite his efforts to remain (Tr. 2863). He also testified that full-time employment could mean two distinctly different kinds of commitment (Tr. 1249–65, 1330–31, 1679–80, 1698, 1703–05). He averred that it was his understanding that an owner or president of a company would be working full-time if he worked "whatever number of hours it took to operate or see that the business succeeded successfully . . . " (Tr. 1679) and that his commitment to work as a general manager was a commitment of this nature (Tr. 1680). He also testified that he was devoting his time to the affairs of the TAM while he was in Washington, D.C. testifying at the hearing in this proceeding (Tr. 1703–04).

135. Mr. Moore is a member of the Knoxville Chamber of Commerce, Urban League, Minority Business Bureau, and Better Business Bureau. He serves on the board of directors of Knoxville College, a historic Black institution (Citizens Ex. 2).

136. George H. Thompson, III, vice president and director of Citizens, is proposed as the station's full-time editorial director (Citizens Ex. 3). As editorial director, Mr. Thompson will supervise the station's news department and formulate the station's editorial policy (*Id.*). Mr. Thompson presently resides in Nashville, Tennessee but plans to move to Knoxville to work at the station (*Id.*). He is a graduate of Tennessee State University and received a law degree from Vanderbilt University in 1972. Mr. Thompson is a Black male (Citizens Ex. 1).

137. Mr. Thompson was formerly vice president and director of the Department of Public and Governmental Affairs of the United Southern Bank of Nashville (Citizens Ex. 3, p. 2). He is now a judicial commissioner for the Metro-Nashville General Sessions Court (Citizens Ex. 28). During 1981, Mr. Thompson co-hosted a

weekly program called *Tennessee Legislative Report*, which was broadcast on WDCN, an educational television station in Nashville. His duties included interviewing members of the Tennessee General Assembly on the air during the legislative session (Citizens Ex. 3).

138. Anne Wilde, secretary, treasurer of Citizens, is proposed as the director of community relations. She will work at least 40 hours per week. As director of community relations she will manage the station's public affairs programming and will be in charge of the station's relations with the Knoxville community and with other communities in the station's service area (Citizens Ex. 4). For many years she resided with her husband in Morristown, Tennessee which is within the proposed Grade A coverage contour of Channel 8 (*Id.*). Mrs. Wilde continues to own a home near Morristown although she has temporarily been living in Point Manalapan, Florida (Citizens Ex. 30). If the Citizens application is granted she will return to the Knoxville area and would commute daily from near Morristown to Knoxville or will live in Knoxville (See statement pursuant to Section 1.65 filed September 6, 1984).

139. Mrs. Wilde has been involved in community activities in Morristown including the corporate board of the Girls Club; The Morristown Chamber of Commerce; The Somo Sala Circle, a womens club dedicated to community improvement, which has built a library in Morristown; The Morristown Chapter of the National Society of the Daughters of the American Revolution; and The Rose Center Service Guild, which is a museum and community center in Morristown. She is also a member of The First United Methodist Church (Citizens Ex. 4).

Tennessee Telecasting, Inc.

140. Tennessee Telecasting, Inc. (TTI) is a Tennessee corporation with the following stockholders (TTI Ex. 1):

Name	*Office*	*% of Voting Ownership*
Henry Posner, Jr.	Chairman/Director	54
Albert M. Holtz	President/Director	30
Thomas D. Wright	Secretary/General Council	15
Fred W. Schwarz	Vice President/Treasurer Director	1

141. TTI proposes no integration of ownership and management (*Id.* at 6).

142. TTI's four principals hold numerous mass communication interests. Together they own 100% of West Virginia Telecasting,

Inc., the licensee of WVAH-TV, UHF Channel 23 in Charlestown, West Virginia (TTI Ex. 1, p. 3). They also own 100% of the voting stock of Meridian Communications Corporation, which owns 100% of the voting stock of Dayton Telecasting, Inc. (TTI application amendment filed June 12, 1984). Dayton's application for new UHF Channel 45 in Dayton, Ohio was granted by Order, FCC 83R-97, released December 1, 1983. The TTI principals collectively own a 90% interest in Greater Portland Telecasting, Inc., which has a five year option to acquire up to 12-1/2% of the stock of Comark Television, Inc., the permittee of Channel 51 in Portland, Maine (*Id.*). Greater Portland also has the right to purchase the construction permit *in toto* should Comark go into bankruptcy and the right to obtain the permit without consideration should Comark fail to construct Channel 51 in a timely fashion (*Id.*).

143. Messrs. Posner and Wright also are officers, directors and own 49% and 5.5% respectively of the stock of Maxicom, Inc., an applicant for cellular mobile radio authorization in Atlanta, Georgia, Tampa-St. Petersburg, Florida and Miami, Florida (TTI Ex. 1). Mr. Schwarz is an officer and director of Maxicom but has no equity interest (*Id.*). In addition, Mr. Posner owns 70% and is a director of American Mobilphone of Alabama, Inc., the operator of a mobile telephone and paging business in Birmingham, Alabama (*Id.*). Mr. Wright owns 8% of American Mobilphone and is secretary and director (*Id.*). Mr. Schwarz is assistant secretary and director of American Mobilphone (*Id.*).

HHS, Inc.

144. HHS, Inc. (HHS) is a Louisiana corporation which is owned 100% by Mr. Harold H. Stream, III, who is its president and one of its directors. Mr. Tony N. Reed is vice president and Mr. Leon Theriot is the secretary of the company (HHS Ex. 1).

145. Mr. Harold H. Stream, III, the 100% owner, will work at the station on a part-time basis up to 20 hours per week, serving as the stations' general manager. He will formulate the stations programming, employment and sales policies and will supervise its implementation on a day-to-day basis (HHS Ex. 2).

146. HHS does not have any interest in broadcast stations or other media of mass communications. Harold H. Stream, III is the chairman and controlling shareholder of Stream Broadcasting of Texas, Inc., licensee of radio stations KOWL and KUFO, Odesso, Texas. Mr. Stream is also chairman and 100% stockholder of Stream Broadcasting, Inc., which previously was the

licensee of radio station KBIU(FM), Lakes Charles, Louisiana. Mr. Stream is also president, director and 100% shareholder of Texas Marketing, Inc. and Louisiana Marketing, Inc. (HHS Ex. 4).

Le Conte Broadcasting Company, Inc.

147. Le Conte Broadcasting Company, Inc. (Le Conte) is a Tennessee corporation with 1,000 shares voting no par common stock issued and outstanding. The officers and directors and shareholders, and their individual interests are as follows (Le Conte Ex. 1-6):

Name	*Office*	*No. of Shares*	*% of Ownership*
Herman J. Russell	Chairman/Treasurer Director	430	43
Don Elliot Heald	President/Director	80	8
Martin B. Seretean	V.P./Director	320	32
James W. Coclin	Secretary/Director	80	8
Donata C. Russell	Director	60	6
Vickee S. Jordan	Director	30	3

148. Herman J. Russell is a Black-American male and Donata C. Russell and Vickee S. Jordan are Black-American women (Le Conte Exs. 2, 3 & 4). It is proposed that Messrs. Russell and Heald and Mses. Russell and Jordan will be involved in the day-to-day management and operation of the proposed station (Le Conte Exs. 1-3).

149. Herman J. Russell will be involved in business, financial and community activities in the Knoxville area on behalf of the proposed station and will devote at least 20 hours per week (Le Conte Ex. 4, p. 1).

150. Mr. Russell is chairman of the board and 51% stockholder of Russell-Rowe Communications, Inc., the licensee of UHF television broadcast station WGXA-TV, Macon, Georgia. In the event of a grant, he will divest himself of any interest or connection he may have in or with Russell-Rowe Communications and station WGXA-TV prior to the time that Le Conte begins operations and in no event no later than one year after Le Conte is granted its construction permit herein (Le Conte Ex. 4). Mr. Russell is also a director and 7% stockholder of Cable Atlanta, Inc., which operates a cable television system in Atlanta, Georgia. He also owns 1% of the stock of Cable Dekalb, a cable television operator of Dekalb County, Georgia. In the event of a grant, he will resign his directorship of Cable Atlanta and place his stock

interest in Cable Atlanta and Cable Dekalb in blind trust (Le Conte Ex. 4).

151. In addition, Mr. Russell has the following business relationships: chairman of the board, president and sole stockholder of H. J. Russell and Co., Atlanta, Georgia, which provides computer data processing and management services to affiliated companies; chairman of the board, president and sole stockholder of Paradise Apartments Management Company, Inc., Atlanta, Georgia an apartment and property managing and leasing company; chairman of the board, president and 70% stockholder of Concessions International, Inc., Los Angeles, California, which operates the food and beverage concession in the Los Angeles International Airport; chairman of the board and 22% stockholder of Enterprise Investment, Inc., Atlanta, Georgia, a real estate investment company; chairman of the board, president and 80% stockholder of City Beverage Company, Inc., Atlanta, Georgia, a distributor of alcoholic and non-alcoholic beverages; chairman of the board, president and sole stockholder of H. J. Russell Construction Company, Inc., Atlanta, Georgia, a construction company; chairman of the board and sole stockholder of Interstate Construction Company, Inc., Atlanta, Georgia, a construction company, chairman of the board, president and 46% stockholder of Interstate Insurance Services, Atlanta, Georgia, an insurance brokerage firm; president and 90% partner of Georgia Southeastern Land Company, Atlanta, Georgia, a real estate development company; chairman of the board and 50% stockholder of D.D.R. International, Inc., Atlanta, Georgia, a construction managment company and chairman of the board of 22% stockholder of Citizens Trust Company Bank, Atlanta, Georgia (Le Conte Ex. 4).

152. Mr. Russell has been active in civic activities, which, however, have all taken place in Atlanta, Georgia (Le Conte Ex. 4).

153. Don Elliot Heald will serve as the full-time general manager of the proposed station and will become a resident of Knoxville in the event of a grant (Le Conte Ex. 1). Mr. Heald is the president, director and 8% stockholder of Russell-Rowe Communications, Inc., licensee of UHF television broadcast station WGXA-TV, Macon, Georgia. In the event of a grant, he will divest himself of any interest or connection he may have in or with Russell-Rowe Communications, Inc. and station WGXA-TV. Prior to the time Le Conte begins operation of its proposed station and in no event later than one year after Le Conte is granted its construction permit (*Id.*).

154. Mr. Heald currently owns less than 1% of the issued and outstanding stock of Cox Communications, Inc., formerly Cox Broadcasting Corporation. In the event of grant, he will place his stock holdings in Cox Communications, Inc. in a blind trust (Le Conte Ex. 1).

155. Mr. Heald has 39 years experience in broadcasting. He has worked as staff announcer, as a news director, a sales manager and general manager (Le Conte Ex. 1, pp. 1-2). From 1969-1980, Mr. Heald was vice president of Cox Broadcasting Corporation, then licensee of broadcast stations WSB (AM, FM, TV), Atlanta Georgia, WSOC (AM, FM, TV), Charlotte, North Carolina; WHIO (AM, FM, TV), Dayton, Ohio; KTVU-TV, Oakland, California; KFI and KOST-FM, Philadelphia, Pennsylvania; WLIF-FM, Baltimore, Maryland and WIOD and WAIA-FM, Miami, Florida (Le Conte Ex. 1).

156. Mr. Heald has been active in civic activities but none have been in the service area of the proposed station (Le Conte Ex. 1).

157. Donata C. Russell is proposed to serve full-time as the business manager of the proposed station and will become a resident of Knoxville in the event Le Conte is granted a construction permit. In her position as business manager, Ms. Russell will be responsible for budget preparation and review, cash projections, overseeing accounting and data processing functions and will supervise personnel involved in the business and accounting department of the station (Le Conte Ex. 2).

158. Ms. Russell is currently employed as a marketing representative for IBM in Philadelphia, Pennsylvania. In the past she has worked as a reserve room supervisor in the Van Pelt Library at the University of Pennsylvania (Le Conte Ex. 2).

159. Vickee S. Jordan will serve full-time as the program manager of the proposed station and will become a resident of Knoxville in the event Le Conte is granted the construction permit. As program manager she will be responsible for selecting, buying, arranging and scheduling of all programs on the station. In addition, she will supervise the station's personnel employed in the program department (Le Conte Ex. 3).

160. Ms. Jordan is currently employed as a production assistant at Burson Marsteller, New York, New York. In the past she was employed as an assistant producer-assistant director at Group W Satellite Communications, Inc., Stanford, Connecticut. From June 1981 to April 1982, she was employed as a floor director at television station WAGA-TV, Atlanta, Georgia. As floor director she was employed in the in-house production and

direction of news and public affairs programming for the station. From January 1981 to May 1981, Ms. Jordan was a production assistant in the public affairs department at television station WPVI-TV, Philadelphia, Pennsylvania (Le Conte Ex. 3).

161. Martin B. Seretean, the vice president, director and 32% stockholder of Le Conte is also treasurer, director and 39% stockholder of Russell-Rowe Communications, Inc., the licensee of UHF television broadcast station WGXA-TV, Macon, Georgia. In the event Le Conte is granted a construction permit he will divest himself of any interest or connection he may have in or with Russell-Rowe Communications, Inc. and station WGXA-TV (Le Conte Ex. 5, p.1). Mr. Seretean is also a director and stockholder of Turner Broadcasting System, Inc., licensee of UHF television broadcast station WTBS, Atlanta, Georgia and the owner of Cable News Network. In the event of a grant he will immediately resign as director of the Turner Broadcasting System, Inc. and place his stock interest in Turner Broadcasting System, Inc. in blind trust (*Id.*). Mr. Seretean also owns 42,017 shares of stock of RCA Corporation which is less than 1% of that corporation's issued and outstanding shares of stock. In the event of a grant he will place any RCA stock which he may own in a blind trust (Le Conte Ex. 5).

162. James W. Coclin, secretary, director and 8% stockholder of Le Conte is also director and 10% stockholder of Russell-Rowe Communications, Inc., the licensee of UHF television broadcast station WGXA-TV, Macon, Georgia. In the event of a grant herein, Mr. Coclin will divest himself of any interest or connection he may have in or with Russell-Rowe Communications, Inc. and station WGXA-TV (Le Conte Ex. 6).

South Central Communications Corporation

163. South Central Communications Corporation (South Central), and Indiana corporation, is authorized to issue 1,000 shares of stock, 808 of which are issued and outstanding and are held by the South Central officers and directors as follows (South Central Ex. 2):[16]

Name	*Office*	*No. of Shares*	*% of Ownership*
John D. Engelbrecht	President/Director	605	74.8
Bettie G. Engelbrecht	Secretary/Director	200	24.7
Leighman C. Groves	Treasurer/Director	3	.5

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[16] By amendment submitted June 18, 1984, South Central reported that John Engelbrecht had purchased 10 shares from his mother, Bettie Engelbrecht, such that he now own's 615 shares (76.1%) of the outstanding stock.

The additional directors of South Central are Marilyn O. Engelbrecht and Robert L. Shirel (*Id.*). Layman C. Groves is the father of Bettie G. Engelbrecht who is the mother of John D. Engelbrecht who is, in turn, the husband of Marilyn O. Engelbrecht (*Id.*). Robert L. Shirel is the controller of South Central and has been employed by South Central for the past twelve years (*Id.*).

164. South Central proposes the modification of its existing license for UHF television broadcast station WTVK (Channel 26), Knoxville, Tennessee to specify operation on Channel 8 at Knoxville in lieu of Channel 26. The proposed Channel 8 operation will be located at the existing Channel 26 site (South Central Ex. 1).

165. Upon grant of the South Central modification application (Channel 26) will continue to be assigned to Knoxville and will be available for application/operation by other parties (*Id.*).

166. Mr. John D. Engelbrecht is proposed to be the full-time general manager of the WTVK operation at Channel 8 at Knoxville. Since 1976, Mr. Engelbrecht has maintained his principal residence in Evansville, Indiana. He does however own a residence in Kodak, Tennessee and spends a minimum of 1 week of each month at this residence. Kodak is a suburb of Knoxville, Tennessee, that is within the city grade service area of the existing and proposed WTVK operation (South Central Ex. 3). Upon grant of South Central's application, Mr. Engelbrecht will move his principal residence to his Kodak home (Tr. at 2485). His wife and children will move there also (Tr. at 2524). Mr. Engelbrecht was a full-time resident of Knoxville during the period 1970 to 1976 (South Central Ex. 3). During his full-time residence in Knoxville, Mr. Engelbrecht was a consultant speaker on broadcasting at the University of Tennessee; the vice president and president of the Tennessee Associated Press; a member of the West Hills Neighborhood Association, and a member of the St. Johns Lutheran Church in Knoxville (South Central Ex. 3).

167. Mr. Engelbrecht has extensive broadcasting experience. He has been a stockholder and officer of South Central since age 21 (*Id.*). He has both worked at and overseen the operations of station WTVK in Knoxville for approximately the past ten years (*Id.*). It is alleged that Mr. Engelbrecht's full-time management of the proposed station will involve a minimum of 40 hours per week (*Id.*). He will also generally oversee through an existing staff structure, South Central's other applications (*Id.*). Mr. Engelbrecht will continue his present travel pattern which will entail

spending one week a month in Evansville, Indiana (Tr. 2489, 2506, 2524-25) and approximately one-half week a month in Nashville, Tennessee (Tr. 2487, 2506, 2524-25). He currently spends about one-third of his time with Channel 26 (Tr. 2490).

168. South Central is the licensee of the following broadcast facilities: WIKY(FM) and WROZ(AM), Evansville, Indiana WTVK(TV) and WEZK(FM), Knoxville, Tennessee (South Central Ex. 4). South Central also owns 100% of Stereo 93, Inc., the licensee of WZEZ(FM), Nashville, Tennessee (*Id.*). Upon grant of its application South Central will divest its interest in station WEZK(FM) (*Id.*). The distance between the communities in which South Central owns broadcast facilities is as follows: Knoxville to Nashville: 160 miles, Knoxville to Evansville: 260 miles, Evansville to Nashville: 150 miles (*Id.*). Other than for the co-located facilities there is no overlap of service among the South Central broadcast facilities(*Id.*).

169. South Central is also the franchisee, either directly or through a subsidiary, Muzak Franchises in Evansville, Indiana; Nashville, Tennessee; Knoxville, Tennessee; Chattanooga, Tennessee; Huntsville, Alabama; and Savannah, Georgia (South Central Ex. 4; Tr. 2486). These operations provide background music service on a subscription basis (South Central Ex. 4).

170. Station WTVK began operating in the Knoxville market in 1953 (South Central Ex. 6). It was acquired by South Central in 1954 and has been operated by South Central since that time (*Id.*). Virtually from inception it has been one of only three operating commercial television stations assigned to Knoxville and during this period has operated as the only UHF station in competition with two VHF stations in the market, WBIR-TV and WATE-TV (*Id.*). WTVK applications for renewal of license have been granted in the ordinary course from inception to date (*Id.*).

171. In 1976 the Commission found that WTVK "... currently achieves a relatively low share of the audience (12% of ADI Hours, 9:00 a.m. to midnight, according to the February 1976 Arbitron sweep)." (*Id.*). Its low rating is due in part to the fact that parts of the viewing audience were unable to receive any UHF signal because of the absence of UHF reception capability in their home sets (*Id.*). The Commission found that in 1975, 86% of television households nationwide had UHF reception capability (*Id.*). The Commission also found that as of 1977 some 92% of such households had a UHF reception capability (*Id.*). As of July 1981 UHF reception was estimated as 93% in the Knoxville ADI (*Id.*).

172. After years of operating losses, WTVK in 1973 experienced a net operating income before taxes of $12,258 (*Id.*). The Commission's official summary of television financial data for that year reported total broadcast income for the three operating Knoxville television stations of $2,173,000. The Commission's official summary of financial data for the year 1980 reported total pre-tax broadcast income for the three operating commercial stations in Knoxville as $8,052,038. WTVK's part of such pre-tax broadcast operating income ws $289,833 (*Id.*).

173. 1979–80 net weekly circulation of the Knoxville stations is reported as: WATE-TV ($393,100); WBIR-TV ($435,500); WTVK ($235,200) (*Id.*). For the same period the respective net worth base hourly rates were WATE-TV ($1,300); WBIR-TV ($1,225); WTVK ($500) (*Id.*).

174. At inception, station WTVK was an affiliate of CBS Network. In 1965 CBS terminated that affiliation in favor of station WBIR-TV. WTVK then became an affiliate of the ABC Network which then and for several years thereafter offered relatively few hours of network programming to its affiliates. For somewhat more than two decades station WTVK remained an affiliate of the ABC Network during the period when that network was acknowledged to be the weakest of the three national networks (*Id.*). Coincident with its emergents as a stronger competitive network force, ABC terminated its affiliation with WTVK in 1979 and entered into an affiliation with Knoxville VHF station WATE-TV which had for years been the NBC affiliate in the market (*Id.*). As a consequence, in September of 1979, WTVK became an affiliate of the NBC Network which was then acknowledged to be the weakest of the three networks (*Id.*).

175. Compared to its 12% share of Knoxville ADI Hours in 1976, noted previously, station WTVK had a 17% share thereof as of July, 1981 (*Id.*). The balance was distributed between the two Knoxville VHF stations.

176. In view of the relative technical and operational handicaps attending its operation as UHF station in the market configured as Knoxville, WTVK has in the past sought to have aVHF channel allocated to Knoxville and the WTVK license modified thereto, so that the station may be better able to compete in the market and thereby provide a higher level of service to the public in that market (*Id.*). Thus, in 1962, South Central filed an application to modify the WTVK license to Channel 8, which was then proposed to be assigned to Knoxville (*Id.*). That effort was rendered moot by the Commission's decision in 1963 to forgo such

assignment in view of the so called "all channel" receiver legislation then proposed (*Id.*). South Central renewed its request for a VHF assignment and related license modification by means of a petition filed in 1975 (*Id.*). Although the Commission ultimately ordered the assignment of Channel 8 to Knoxville through the proceeding in Docket Number 20418, it declined to entertain separately a South Central license modification application and opened the Channel 8 assignment to application by any party (*Id.*).

177. The WTVK technical operation and equipment are state of the art. Several improvements and innovations in the station's technical capabilities have been made over the past twenty years as funding was available (South Central Ex. 6-B). Among such efforts were the following:

> *1962:* Acquisition of a new tower, transmitter and antenna and an increase in operating power to 1,000 kw. The station also acquired at that time all new major studio equipment including cameras, tape machines and film chain. The approximate cost of these improvements was $1,000,000.
>
> *1974:* Acquisition of a new mobile, remote production vehicle at a cost of approximately $185,000. This was the first such facility acquired by any of the Knoxville television stations and remained unique in the market for approximately the three succeeding years. The facility enabled Station WTVK to undertake then unique remote coverage and programming from outlying communities within its service area.
>
> *1979:* Station WTVK entered into a contract to acquire another new transmitter, antenna, some 1,000 feet of outsize transmission line, transformer, and other equipment in connection with its application (BPCT-791110LC) to increase operating power to 5,000 kw, the maximum power authorized for UHF television stations. The application was granted on March 28, 1980. The new antenna was installed on WTVK's 10,060 foot tower and immediately failed. For the succeeding year the station was required to operate with substantially reduced power and ultimately to install an interim, lower antenna pending the supplier's fabrication of a new replacement antenna and the beginning of authorized maximum power operations on September 27, 1981. The basic cost of the maximum power modification was approximately $1,200,000.
>
> *1979:* Station WTVK also acquired the first remote microwave (live eye) capability in the Knoxville market. The cost of the basic vehicle and associated equipment was approximately $175,000 (*Id.*).

178. For years, Station WTVK has produced and broadcast two half-hour local news programs each weekday at 6 p.m. and 11 p.m. (*Id.*). It also broadcast five-minute, local news segments during the weekday, morning network programming at 7:25 and 9 a.m. during the "Today" program (*Id.*). WTVK maintains a full-time

news reporter exclusively at the Knoxville City Hall in connection with its purpose to report on all local government developments (*Id.*). Neither of the Knoxville VHF television stations maintains a reporter exclusively at City Hall (*Id.*). WTVK was also the first market station to provide live coverage of the local election activity and returns from remote locations throughout the area (*Id*). This was first done in 1978 (*Id.*).

179. WTVK seeks to emphasize local events, problems and interests in all of its news programming (*Id.*). Virtually every newscast includes a discrete segment devoted to local matters, whether or not "breaking news", designed to inform the local viewers as to a host of developments in Knoxville and its environs (*Id.*). These segments commonly run for a minute and a half per subject and several subjects are usually covered during a single newscast (*Id.*). The record reflects a wide range of topics of local concern covered by WTVK during the period of August 1978 to August 1981 (South Central Ex. 6-D, Appendix 1).

180. Station WTVK has met and exceeded its news and public affairs programming proposals in the past (South Central Ex. 6-D).

181. In addition to its emphasis upon local matters as an incident of its news programming, WTVK has presented programming on such matters apart from a news context (*Id.*). Its principal vehicle for such coverage over the years has been the station's recurring public affairs program, "Focus", a half hour per week program commonly broadcast on Sunday evenings and on Saturday evenings in some instances (*Id.*). The record reflects that during the period January 1979, through December 1981, a wide range of topics of local concern were discussed in this program (South Central Ex. 6-D, Appendix 2). Having acquired in 1974 the first television remote production capability in the Knoxville market, Station WTVK undertook a special series of public affairs originations from outlying communities within the station's service area (South Central Ex. 6-D). Such originations involved on-site stays of multiple days' duration and were the first such programs undertaken by any of the Knoxville television stations (*Id.*).

182. Station WTVK's application for renewal of license filed April 1, 1976, reflected that the station broadcast a total of 190 public service announcements during the relevant composite week (South Central Ex. 6-D). Its renewal application filed April 1, 1979, reflected the broadcast of 257 public service announcements during the relevant composite week (*Id.*). The 1979 renewal

applications for the Knoxville VHF stations reflected composite week public service announcements of 159 (WBIR-TV) and 183 (WATE-TV) (*Id.*). During the 1980 composite week, Station WTVK broadcast 218 public service announcements, 166 of which were of 30 seconds or longer duration and which concerned such local matters as the Knoxville Symphony; Hearing and Speech Center; Knoxville Volunteers; Knoxvisit; University of Tennessee Theatre; Leader Dogs; Job Services; Knoxville Rape Crisis Center; United Way; Tri-County Library; Patricia Neal Rehabilitation Center; Children's Theatre; Commuter Pool; Knoxville Community Theatre; and Shrine paper sale (*Id.*).

183. The most recent FCC summary of television program data was released on December 15, 1980 for the year 1979 (*Id.*). It reflects, *inter alia*, that 27.8% of WTVK's broadcast time (6 a.m. to midnight) was devoted to non-entertainment material compared to 22.4% for WATE-TV and 27.2% for WBIR-TV. WTVK broadcast 4.0% public affairs during the prime time (6 p.m. - 11 p.m.) compared to 3.1% and 3.8% for WATE-TV and WBIR-TV respectively (*Id.*). WTVK exceeded, and in some cases was exceeded by, the Knoxville VHF stations in other quantitatively measured categories during the 1979 composite week as reported by the Commission (*Id.*).

184. Station WTVK has sought to provide special programming and services in response to particular community requirements and interests. Examples of such efforts are as follows:

— Station WTVK provides captioning for the deaf in its regular news programming. It began that service in March 1976, and has provided it since that time. The service is currently provided during WTVK's morning news program every weekday.

— The annual Dogwood Arts Festival in Knoxville is the largest such festival in the nation, running some 17 days and involving some 300 separate events and some 8,000 volunteer workers. It is a union of civic, governmental and social interests now in its 23rd year. Station WTVK has been the principal television outlet for promotion and support of the Festival and related activities for the past decade. It produces many of the spot announcements used by the Festival in its promotional efforts.

— In September, 1979, John Tate, a Black resident of Knoxville, fought for the heavyweight championship in South Africa. Station WTVK provided on-site coverage of the event to Knoxville, sending a three man crew to South Africa for that purpose.

— From 1973 to 1977, Station WTVK broadcast a weekly half hour program, entitled "Drum", which was produced and directed by Blacks for the Black community in Knoxville. In many instances the program was expanded to an hour's duration.

- In November, 1978, the station made special arrangements with the network and the NCAA which enabled WTVK to provide live, remote coverage to its Knoxville viewers of a football game in South Bend, Indiana, between the University of Tennessee (Knoxville) and Notre Dame. That was the first such coverage provided by any Knoxville television station.

- In May of 1981, WTVK began the planning for its coverage of Knoxville's World Fair. WTVK has a full studio production and origination capability on the Fair grounds property (in the Sunsphere). Through these unique facilities it originated a daily, live, hour long program, "Today at the 1982 World's Fair".

- The station broadcasts a recurring public affairs series entitled "Unit IV", the essential purpose of which is to promote strong academic curricula in the area's schools with emphasis on principally minority schools.

- In May 1981, WTVK began a series entitled "Operation Crime Lock", the principal purpose of which was to educate the public in terms of crime prevention and awareness (South Central Ex. 6-E).

185. The record reflects sworn statements from 24 public witnesses that are supportive of WTVK's past performance (South Central Ex. 6-F). For example, Randy Tyree, the Mayor of Knoxville, Milton Roberts, a Knoxville Councilman, Frank Deller, Executive Vice President of The Knoxville Chamber of Commerce, Jack Reese, Chancellor of the University of Tennessee at Knoxville, James Wells, Executive Director of the Dogwood Arts Festival, Travis Parker, past president of the Easter Seal Society and Robert Samples, Executive Director of East Tennessee Chapter of the American Heart Association all testified that WTVK, does a good job covering community events and spotlighting community needs (South Central Ex. 6-F).

Conclusions

Section 307(b) Issue

186. Section 307(b) of the Communications Act, 47 U.S.C. 307(b), requires the FCC to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same". Traditionally, in resolving Section 307(b) issues, the Commission seeks to determine the relative need of each applicant's proposed service area for a new reception service and relative needs of each

applicant's specified community for a new transmission service. *Cleveland Television Corp.*, 91 FCC 2d 1129, 1136 (Rev. Bd. 1982), *rec. den.*, FCC 83-235, released May 18, 1983, *aff'd sub. nom. Cleveland Television Corp.*, v. *FCC* 732 F2d 962 (D.C. Cir. 1984); *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2608 (1961).

187. In cases such as this, however, in which applicants propose to cover approximately the same areas and populations, reception service offers no basis of comparison. Indeed, TTI disavows any preference under Section 307(b) on the basis of reception. TTI seeks a dispositive preference based upon the provision of first television transmission service to Maryville, Tennessee, its proposed community of license. Whether a Section 307(b) preference can properly be awarded to TTI depends upon whether Maryville in fact is a separate community with identifiable needs justifying the assignment of a new transmission outlet. *Cleveland Television Corp., supra* at 1136.

188. The Commission and the courts have recognized that television channels are scarce and are intended to provide wide-area service. See *Cleveland Television Corp., supra*. The Review Board has noted:

> "Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues ... the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes should be defined in terms of coverage and not in terms of artificial political boundaries. *Cleveland Television Corp., supra* at 1137.

189. Maryville, a small city roughly one-tenth the size of Knoxville, is located 15 miles away in one of the member counties of the Knoxville Metropolitan area. Knoxville is the economic center of a vast, four-county metropolitan area in East Tennessee. At present, over 20% of the employment age population of Blount County work in Knoxville. In addition, the manufacturing companies which represent an increasing portion of Maryville's economic base remain dependent on Knoxville for the provision of industrial support services. Knoxville similarly provides the means for shipping freight to and from Maryville along the United States waterways and, although Maryville has no intra-city bus service, it has an intra-city bus line which connects it to Knoxville.

190. Although Maryville is in a different county from Knoxville, Maryville is plainly a subordinate suburb to the regionally more important, central city.

191. The identity of Maryville with the larger Knoxville Metropolitan area is underscored by TTI's proposal to place its transmitter on Sharp Ridge. Sharp Ridge is the site of choice for service to the city of Knoxville. Significantly, TTI acknowledges that coverage of Knoxville was an important factor in choosing the Sharp Ridge site. The national as well as local retail advertisers which TTI hopes to attract to its station will all be directing their advertisements to the joint Knoxville-Maryville market. TTI concedes that it is this joint market that it intends to serve.

192. With TTI's transmitter on Sharp Ridge, there is no cognizable difference between the coverage proposed by TTI and the other applicants.

193. Finally, it can be gathered from the Commission's decision allocating Channel 8 to Knoxville, *VHF TV Top 100 Market*, 81 FCC 2d 233, 265 (1980). *recon. denied*, 90 FCC 2d 160 (1982), that the channel was assigned not to serve one small suburban locality but to provide area-wide service to the principal community of Knoxville and its environs.

194. The proximity of Knoxville and Maryville, their relative sizes, and great extent to which Maryville is dependent on the principal community of Knoxville established that Maryville is not a "significantly independent" separate community for purposes of Section 307(b) in a television licensing proceeding. See *RKO General, Inc. (KHJ-TV)*, 5 FCC 2d 516 (Rev. Bd. 1966), *aff'd sub nom. Fidelity Television, Inc.* v. *FCC* 515 F.2d 684 (D.C. Cir. 1975). Accordingly, no preference under Section 307(b) can be awarded.

Section 73.3514 and Section 1.65 Reporting Issue (Citizens Community Television, Inc.)

195. The record reflects that Citizens has failed to apprise the Commission of material information. For example, its application as initially filed did not disclose Mr. Moore's directorship of a bank, his ownership of a pharmacy in Knoxville nor his ownership in Mirus, Inc.

196. In addition, Citizens has failed on numerous instances to report substantial and significant changes in the information in its application. For example, Citizens did not disclose Mr. Thompson's interest in the Black Coalition for Media Diversity, Inc. until September 1982, approximately six months after the information of the corporation and the filing of some 63 low power applications. Similarly, Mr. Thompson's interest in Media

South, a licensee of an AM-FM combination, reacquired in January of 1982, was not reported to the Commission until September 28, 1982. The failure to report Mr. Thompson's interest in other applications and broadcast licenses involved matters which are clearly of decisional significance. *Harold James Sharp*, 56 FCC 2d 251, 253 (Rev. Bd. 1975). Citizens' principals attribute the failure to report this information to factors other than intentional concealment. Nonetheless, because the Commission is forced to rely upon applicants to furnish complete and accurate information, reporting violations must be considered in the comparative evaluation of Citizens. Accordingly, the violations outlined above give rise to a comparative demerit to Citizens. *Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc.*, v. *FCC* 722 F.2d 756 (D.C. Cir. 1983).

197. Furthermore, although the inaccuracies in Citizens' application cannot be attributed to any intent to conceal, nevertheless, the events on the part of Citizens' principals evince a cavalier approach to the licensing process which was so grossly careless and negligent that it culminated in the submission of a forged document as part of the basic qualifications showing. In light of this, Citizens reliability as licensee expected to demonstrate full and complete candor to the Commission is suspect. A moderate demerit must be levied on Citizens for violations of Sections 1.65 and 73.3514.

Financial Qualifications Issue (Community Broadcasters of Knoxville, Inc.)

198. For a broadcast applicant to be deemed financially qualified, the applicant must provide "reasonable assurance" of the availability to it of a bank loan. *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980); *Sinton Broadcasting Co.*, 59 FCC 2d 1519, 38 RR 2d 341, 343 (Rev. Bd. 1976); *Jay Sadow (WRIP)*, 39 FCC 2d 808, 810 (Rev. Bd. 1973). This assurance need not be a contractually binding bank loan commitment, but it must be more than a vague letter indicating interest in making the loan. See *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1051 (Rev. Bd. 1982); *Washington Star Communications, Inc.*, 57 FCC 2d 475 (1975). Community, having failed to provide any letter from any lender, has failed to meet the standard of reasonable assurance and must be disqualified.

199. Community's own witness, Dr. Walker, testified expressly that the involvement of a bank was essential to his financing scheme, and that Community would have to negotiate such a loan

directly with the bank. Neither Dr. Walker nor Mr. Richman furnished a letter from the Bank of Clearwater evidencing its commitment to Community; indeed, no one had approached the Bank of Clearwater concerning Community's financing scheme. Because Community has not provided a "reasonable assurance" that a bank loan could be available to finance Community's broadcast plans, it must be disqualified.

Lack of Candor—Community Broadcasters of Knoxville, Inc.

200. Although no candor issue has been specifically designated in this proceeding, the testimony of Mr. Dale Richman, chairman of the board and president of Community and the general manager of its proposed station, raises serious questions regarding that applicants' representations to the Commission concerning the resignation of Mr. John Settles from the applicant corporation.

201. Mr. Richman's testimony at the hearing was inconsistent in material respects with his earlier testimony at his deposition, and on several occasions he also contradicted his own testimony at the hearing sessions. Most of the contradictions and inconsistencies involved the subject of Mr. Settles resignation which occurred in February of 1982, only 13 months before Mr. Richman testified at the hearing. Community sought to cast Mr. Settles' resignation as an involuntary act caused by medical problems. Mr. Settles' incarceration in the Knoxville jail, a fact known to Community's principals, was not disclosed until the hearing, despite direct and repeated questioning on the topic during discovery proceedings. In order to maintain a high degree of licensee character, and to protect the integrity of the Commission's adjudicatory proceedings, the lack of candor in Mr. Richman's testimony cannot be tolerated and Community must be accorded a substantial demerit.

Comparative Issue

Diversification

202. East Tennessee, Le Conte, Telecorp, Community and Citizens have no cognizable interests in media of mass communications.

203. KBC's non-voting shareholders have minority interests in a number of publicly-held broadcast-related companies; majority interests in a Buffalo, New York television station; and a less than controlling interest in a television construction permit in

Syracuse, New York. However, these shareholders have no voting interests in KBC and will not participate in the management or operation of the station. Consequently, their outside broadcast interests may not be attributed to KBC. KBC then is charged with no cognizable interest in media of mass communications.

204. KTTV's 51% stockholder is the owner of three television stations, and one television construction permit, in communities outside of Tennessee which are over 250 miles from Knoxville. HHS's 100% stockholder owns 2 radio stations in Texas. Telecasting's principals own a television station in Charleston, West Virginia.

205. South Central owns 2 radio stations in Evansville, Indiana, a radio station in Nashville, Tennessee, a UHF television and an FM radio station in Knoxville, Tennessee. South Central is also the granchisee of a number of muzac franchises. South Central's muzac franchises do not constitute media of mass communication. South Central is not charged with the ownership of its FM station in Knoxville because it is committed to divest itself of that facility if its application is granted (See *Hearing Designation Order* herein). Although South Central will vacate its UHF Channel 26 in the event of a grant herein, under the rationale of *Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604 (Rev. Bd. 1982) it must be awarded a slight demerit under the diversification criteria.[17]

206. KBC, ETB, Le Conte, Telecorp, Citizens and Community have a slight diversification preference over KTTV, HHS and Telecasting, since the media properties owned by these applicants are distant from Knoxville and are not sufficiently impacted on the question of media concentration in Knoxville. All of the applicants have an additional slight diversification preference over South Central that owns media properties in Tennessee.

Best Practicable Service

Integration

207. *KBC* is entitled to credit for the proposed full-time integration of principals owning 42.25% of its stock. An 8.25%

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[17] South Central argues that under the rationale of *Vacationland Broadcasting Co. Inc.*, 55 RR 2d 12959 (Rev. Bd. 1984) it shouldn't be assessed any diversification demerit for its VHF Knoxville Channel 8. However, *Vacationland* is distinguishable from the instant situation in that in *Vacationland* the licensee was not penalized because there was no evidence that *Vacationland* would continue although not required to do so to operate its FM station if its application were denied whereas here South Central has indicated that it would continue to operate its existing TV station if its application is denied. See *Vacationland*, FCC *Order* 85-275, released May 21, 1985.

stockholder proposes to work part-time as community affairs director. KBC quantitative integration credit is enhanced by 8.25% minority ownership (Frazier), 42.25% local residence and proposed local residence, and is slightly enhanced by the past broadcast experience of the integrated partners and by the varying degrees of civic participation they have displayed. The part-time integration is enhanced by female ownership, civic involvement and local residence.

208. *Community* is disqualified on the financial issue. Were Community not disqualified under the financial issue, it would be entitled to a credit for integrating 25% of its ownership into day-to-day management. Battershell's 12.5% is enhanced for local residence and past broadcast experience whereas Cheryl Richman's 12.5% ownership is enhanced by local residence and female status. Community is not entitled to credit for its proposal to integrate Mr. Richman, because Mr. Richman's creditability has been disproved. Community is not entitled to credit for Anita Carter-Cobbs' proposed participation as she was not proposed for a management position as of the "B" cut-off date and the current proposal is an improper upgrade. See *Birmingham Family TV, Inc.*, 91 FCC 2d at 352; *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 590 (Rev. Bd. 1982). No integration credit may be granted for Stephen Fulton Smith's part-time participation or Della Sue Collins' or Anna Jane Battershell's full-time participation. The functions and responsibilities proposed for each of these principals are essentially those of broadcast station employees and may not be credited. *New Continental Broadcasting Co.*, 88 FCC 2d 830 (Rev. Bd. 1981). The record reflects that Mr. Smith will merely serve in an advisory, consultative role. Ms. Collins will essentially be an on-air personality rather than a policy making manager and Ms. Battershell will act as counselor and a reporter.

209. *ETB's* application proposed the full-time integration of Jane Grams and Ann Barker-Furrow and the part-time integration of Dr. Howard, Dr. Havey and Mr. Martin. The integration proposal of 24.4% full-time and 25.2% part-time integration was subsequently "clarified", after the "B" cut-off date, to show 92.8% full-time integration of ownership and management. This subsequent to the "B" cut-off date clarification is deemed to be an impermissible upgrading of the integration proposal. ETB will be bound by the integration proposal submitted prior to the "B" cut-off date. *Peoples Broadcasting Corp.*, 92 FCC 2d 1303 (Rev. Bd. 1983); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 50 RR 2d 1142 (Rev. Bd. 1982); *Birmingham Family TV, Inc., supra.*

Consequently, ETB is entitled to credit only for the full-time integration of 24.4% of its ownership and part-time integration of 25.2%. This integration is enhanced by the 24.4% full-time integration of females (Ms. Grams and Mrs. Furrow), and the 7.2% part-time integration of a Black male (Dr. Harvey). ETB is also entitled to local residence and civic activity enhancements for Ms. Furrow, Mr. Martin, Dr. Howard and Dr. Harvey. Finally, ETB is entitled to a slight enhancement for past broadcast experience of Mrs. Grams and Dr. Howard.

210. *Telecorp.* Each of the five principals have been proposed for day-to-day management. However, Sue Carr-Walker's proposal for full-time participation is not credible and therefore will not be credited. Mrs. Walker, who is nearly 60 years old has never held a job. She has no experience in broadcasting or coordinating and supervising the promotional efforts of a television station. She has lived her entire life in Johnson City. She has never lived in the proposed coverage area of Channel 8 and has never been involved in any civic or community activities in Knoxville. She has stated she has no intention of selling her house in Johnson City.

211. It appears that Mrs. Walker is part of Telecorp solely for her financial capabilities. The record reflects that she has put more money into the corporation in the form of capital and loan than any other stockholder. She admitted that she first became aware of the Channel 8 application as an investment opportunity, and whereas the other four principals each pay for their stock with cash and personal services, Mrs. Walker, paid only in cash. Under these circumstances her proposal of participation in day-to-day management is not credible and she cannot be accorded any integration credit.

212. Accordingly, Telecorp is entitled to credit for 80% full-time integration. Its integration proposal is enhanced by the participation of Mr. Boston, who is Black. Telecorp is also entitled to an enhancement credit for the local residence of Messrs. Bagwell, Cosby and Boston. Mr. Taylor's integration proposal is not entitled to a local residence enhancement since Johnson City is located beyond the grade B contour of the proposed station. Only those civic activities occurring within the proposed service area are entitled to credit. Consequently, Telecorp's proposal is credited with the civic activity of Messrs. Bagwell, Cosby and Boston, but not that of Mr. Taylor's. Telecorp is also entitled to enhancement credit for the past broadcast experience of Messrs. Bagwell, Cosby and Boston.

213. *KTTV* is entitled to credit for the proposed integration of Kevin Glazer, its 49% shareholder. Mr. Glazer's broadcast experience is not extensive but he is awarded a minor enhancement for proposed local residence.

214. *Citizens* is credited with the full-time integration of Anne Wilde, (14%) and her participation is enhanced by female status. Citizens is also credited with the full-time integration of George Thompson (29%), whose participation is enhanced by his minority status and future local residency. No integration credit can be given to the proposal of Thomas L. Moore. Based on his peculiar definition of what it means to devote full-time to a given enterprise, his commitment to devote 40 hours per week to the affairs of the station is not credible. See *Rockland Broadcasting Co.*, 36 FCC 2d 303, 314 (1964); *Gainsville Media, Inc.*, 72 FCC 2d 807, 814 (1978).

215. *TTI.* No TTI principal proposes to participate in the management of the proposed television station on a day-to-day basis. Accordingly, TTI is entitled to no credit under the integration criterion.

216. *HHS.* Harold H. Stream, III, 100% owner of HHS does not propose to work a minimum of 20 hours per week at the station, therefore, HHS is entitled to no credit under the integration criterion. *Midwest Broadcasting Co.*, 70 FCC 2d 1489 (Rev. Bd. 1979).

217. *Le Conte.* Le Conte is entitled to credit for the full-time participation and management of Don E. Heald, 8% owner, Donata C. Russell, 6% owner and Vickee S. Jordan, 3% owner. Le Conte also proposes the part-time integration of Herman J. Russell, 43% shareholder. Mr. Heald's integration is enhanced by his future local residence and past broadcast experience. Mr. Russell's integration is enhanced by past broadcast experience and minority status. Donata Russell's participation is enhanced by future local residence and minority and female status. Ms. Jordan's participation is enhanced by future local residence and her minority and female status.

218. *South Central.* South Central proposes to integrate John D. Engelbrecht (74.8%) owner as full-time general manager. However, he will be spending one week per month in Evansville overseeing the company's radio stations and one-half week per month in Nashville overseeing the company's other radio station. This will prevent him from spending time on a daily basis at the Channel 8 facility and precludes full-time integration credit. See *Policy Statement*, 1 FCC 2d 393 (1965). To receive full-time

integration credit, one must commit to devote 40 hours each week involved with day-to-day station management; merely contributing the equivalent of 40 hours per week over a longer period of time is inadequate. *High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 633 (Rev. Bd. 1983). It appears that Mr. Engelbrecht does not even qualify for part-time credit. In *High Sierra*, the Review Board held that "part-time participation must at least be on a weekly basis to receive (any) credit". Inasmuch as South Central is not entitled to any integration credit, it also fails to receive any enhancement credit for Mr. Engelbrecht's past and future residence, past broadcast experience, civic participation and past broadcast record. See *Policy Statement, supra.*

Final Comparative Evaluation

219. Under the diversification criterion KBC, ETB, Telecorp, Citizens, Le Conte and Community have a slight diversification preference over KTTV, HHS and TTI. All of the applicants have an additional slight diversification preference over South Central.

220. Under the integration criterion, Telecorp has a decisive edge over each of the other applicants. Telecorp's advantage can not be overcome by the qualitative attributes of any of the competing applicants. *The New Continental Broadcasting Co., supra.*

221. Telecorp is the clear winner, having a decisive edge under the integration criterion and having no media interests charged against it.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Tennessee Telecorp, Inc. (File No. BPCT-810615KG) for a construction permit to build and operate a new VHF television station on Channel 8 in Knoxville, Tennessee, IS GRANTED and the applications of Knoxville Broadcasting Corp. (File No. BPCT-810209KE); Community Broadcasters of Knoxville, Inc. (File No. BPCT-810612KE); East Tennessee Broadcasting (File No. BPCT-810612KF); Knoxville Tennessee T.V., Inc. (File No. BPCT-810615KM); Citizens Community Television, Inc. (File No. BPCT-810615KQ); Tennessee Telecasting, Inc. (File No. BPCT-810615KT); HHS, Inc. (File No. BPCT-810615KX); Le Conte Broadcasting Company, Inc. (File No. BPCT-810615KY);

and South Central Communications Corporation (File No. BPCT-810615LA) ARE DENIED.[18]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

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[18] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

First Local Transmission-Unbuilt Facility: Dual License Programming Evidence-Need for

Review Board reverses *I. D.* in part, crediting (and granting) Troy, Ohio applicant, to modify unbuilt facility that would not be built unless its sought frequency change were granted as proposing a first local transmission service under Sec. 307(b). Aff'd crediting of station dually licensed to Columbus-Worthington, Ohio as existing local outlet for Worthington, thus eliminating Worthington applicant from Sec. 307(b) consideration and permitting affirmance of grant of Point Pleasant, W.Va. applicant because no longer mutually exclusive. Programming evidence of outlet's alleged failure to serve Worthington properly excluded because no issue and no threshold showing.

—*Land O'Lakes B/cing Corp. WTRJ(AM)*
MM Docket No. 84-481

FCC 86R-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAND O'LAKES BROADCASTING CORPORATION WTRJ (AM) Troy, Ohio	MM Docket No. 84-481 File No. BP-820720AK
WPTW RADIO, INC. WPTW(AM) Piqua, Ohio	MM Docket No. 84-484 File No. BP-821014AA
ADVANCED ALLIED COMMUNICATION TECHNOLOGIES, INC. Worthington, Ohio	MM Docket No. 84-486 File No. BP-821122AC

Vernon H. Baker d/b/a POINT PLEASANT BROADCASTING COMPANY Point Pleasant, West Virginia	MM Docket No. 84-487 File No. BP-821122AD
Edward A. Baker d/b/a UNION CITY RADIO Union City, Indiana	MM Docket No. 84-489 File No. BP-821122AG
For Construction Permit	

Appearances

Lauren A. Colby, for Land O'Lakes Broadcasting Corporation; *Donald E. Martin*, for Advanced Allied Communication Technologies, Inc.; *Julian P. Freret*, for Point Pleasant Broadcasting Company; and *Christopher D. Imlay*, for Union City Radio.

DECISION

Adopted: February 28, 1986; Released: March 7, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. Four applicants for four different communities remain in this traditional Section 307(b) comparative case (47 U.S.C. § 307(b)). The question presented is whether the Presiding Administrative Law Judge correctly oncluded that only the communities of Point Pleasant, West Virginia, and Union City, Indiana, have demonstrated a need for first local broadcast stations because Troy, Ohio, was issued a construction permit for a new broadcast station in 1979, which has never been built, and Worthington, Ohio, already has a local broadcast Station WRFD(AM), which is dually licensed to both Columbus and Worthington. For the reasons set out below the Review Board has concluded that the communities of Point Pleasant and Troy are more in need of their first local broadcast stations than Worthington and Union City. *See* paras. 15-16 below.

2. *Background*: The four remaining applications of Land O'Lakes Broadcasting, Advanced Allied Communications Technologies, Point Pleasant Broadcasting, and Union City Radio seek authority to construct a new AM broadcast station to operate on 1030 kHz in the communities of (a) Troy, Ohio, (b) Worthington, Ohio, (c) Point Pleasant, West Virginia, or (d) Union City, Indiana, respectively. The fifth applicant, WPTW Radio, Inc., has not filed exceptions and will be dismissed for failure to prosecute. *See* 47 CFR 1.276(f). A Section 307(b) issue was designated to determine which proposal or combination of proposals would best provide a fair, efficient, and equitable distribution of radio service. *Hearing Designation Order*, 49 Fed. Reg. 22531, published May 30, 1984. After a trial-type hearing, Administrative Law Judge (ALJ) Conlin issued an *Initial Decision*, FCC 85D-55, released August 29, 1985, which held that only the communities of Point Pleasant and Union City could be viewed as being entirely without local service. He therefore granted the applications for those communities and denied those for Troy and Worthington.

3. Exceptions were filed by the unsuccessful applicants for Troy and Worthington, and a consolidated opposition was filed by the victorious applicants for the communities of Point Pleasant and Union City. The Board has reviewed the case in light of their pleadings, the oral argument held December 20, 1985, and our examination of the record. We adopt the findings of fact and conclusions of law, except as modified below. However, because we disagree with the determination that the community of Union City is preferred over Troy on Section 307(b) grounds, we reverse in part and grant the applications for Troy and Point Pleasant.

4. Our Section 307(b) analysis incorporates all of the ALJ's detailed factual findings concerning the "reception" service each applicant proposes and the demographic characteristics of each proposed community of license. *I.D.*, paras. 6-15, 23-28, 30-37, 39-48, 67-68. We agree that because all the proposed service areas already receive at least five services, and are thus adequately served, "the need for new reception service is not a decisional factor in this case . . .[which] thus turns on the relative need of the specified communities for a new transmission service." *I.D.*, paras. 69-70 (*citing Archilla-Marcocci Spanish Radio Co.*, 101 FCC 2d 522, 58 RR 2d 967 (Rev. Bd. 1985).

5. In evaluating the "transmission" or local broadcast needs of the communities, the ALJ determined that the communities of Point Pleasant and Union City had no existing local broadcast service and that Troy and Worthington each had one. *I.D.*, para.

79. In particular, with regard to Worthington, Station WRFD(AM) is "dually" licensed to Columbus-Worthington and therefore was considered to be an existing local transmission service for Worthington. *I.D.*, paras. 27, 75. Troy was deemed to be served by Land O'Lakes' Station WTRJ(AM), which is in fact an unbuilt construction permit that the applicant here seeks to modify by changing frequencies. *I.D.*, para. 6 n.4 and paras. 58-66, 73-74.

6. *Troy's Needs*: Land O'Lakes, the Troy applicant, filed an amendment on December 30, 1982, after the A cut-off date in this proceeding, to report that it did not intend to extend the construction permit for its authorized but unbuilt 250 watt, 1510 kHz, daytime-only facility. The permit was to expire by its terms on March 15, 1983. The amendment requested that the application be treated as one for a new station rather than as one to modify an existing facility, but was submitted on condition that it not be considered as proposing a major change that would require the assignment of a new file number. On May 4, 1984, the commission's Mass Media Bureau rejected the amendment, apparently because its acceptance would have required the assignment of a new file number and return of the application to the processing line. Shortly thereafter, the *Hearing Designation Order, supra*, in this proceeding was released, and the Land O'Lakes application was described in the caption as one for modification of an existing authorization. Land O'Lakes thereupon tendered an amendment identical to the one rejected by the Bureau, but the ALJ denied it as, in effect, an impermissible request to reconsider the *Hearing Designation Order*. *See I.D.*, n.4 and paras. 62-63.

7. Although its original amendment was filed prior to the B cut-off date by which amendments as of right must be filed, *see* 47 CFR § 73.3522(a)(2), the ALJ viewed Land O'Lakes as seeking "to exploit" its intention not to construct its authorized facility "by using it as a reason for converting its pending application for modification into an application for a new facility, thereby obtaining a more favored position for its 1030 kHz application" under Section 307(b). *I.D.*, para. 64. He therefore ruled that the Land O'Lakes application must be considered as one for modification of an existing facility, necessarily resulting in the attrbituion of that facility to the community of Troy for Section 307(b) purposes. Land O'Lakes excepts to this conclusion. It argues that it had good economic reasons for not constructing its 1510 kHz facility, and that even if it is assumed that it still has an

outstanding permit for that frequency, the fact is that Troy has no operating station. As Troy is a much larger community than Union City, Land O'Lakes argues that under governing Section 307(b) law its application should have been granted.

8. We agree with the preliminary conclusion that the Land O'Lakes construction permit is still legally viable since an expired "construction permit does not 'lapse' . . . until the Commission declares it forfeited" and the Commission did not dismiss the application here. *I.D.*, para. 65 (*quoting MG-TV Broadcasting Co.* v. *FCC*, 408 F.2d 1257, 1261 (D.C. Cir. 1968), and *citing Mass Communicators, Inc.* v. *FCC*, 266 F.2d 681 (D.C. Cir. 1959)). *See also Amendment of Section 73.3598*, Memorandum Opinion and Order, FCC 85-647, released December 17, 1985, at n.11 (Sec. 73.3599 revised editorially to conform with long-standing practice that an expired construction permit is not forfeited until the Commission affirmatively declares it so). The ALJ is also correct that the application is for a modification, as determined by the *Hearing Designation Order*. But the Board disagrees with the ultimate conclusions to be drawn from these circumstances.

9. The record reveals that Troy receives no actual service from the unbuilt Land O'Lakes permit and that the applicant will not construct its currently authorized facility regardless of the outcome of this proceeding. Thus, we cannot "presume" that Troy in reality has an existing local transmission service. (*See Miner* v. *FCC*, 663 F.2d 152 (D.C. Cir. 1980)). Land O'Lakes tendered a pre-B cut-off date amendment setting forth its intention not to build the authorized facility. Since Section 307(b) involves not a choice of applicants but one of communities, and thus focuses on whether and to what extent the communities receive actual service, *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), we hold that the community of Troy should suffer no Section 307(b) disadvantages by the attribution of a "fictitious" local transmission service that does not and will not exist. Therefore, we credit the Land O'Lakes application as proposing a first local outlet for Troy.[1]

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[1] A community's existing stations and *authorizations* which, in the absence of contrary evidence, we can reasonably presume will lead to the institution of *actual services*, are given Section 307(b) consideration. Bare frequency allocations to a community and pending applications are disregarded because they do not sufficiently guarantee the "eventuation of a station." *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 785, 57 RR 2d 662, 667 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469, 57 RR 2d 1363 (Rev. Bd. 1985), *aff'd as modified on other grounds sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986). Here, Land O'Lakes has rebutted the presumption that its 1510 kHz facility will be constructed. Moreover, the existence of a new FM

10. This conclusion moots the need for us to remand for a hearing on Land O'Lakes rejected Exhibit 4. That exhibit was designed to show that Land O'Lakes' decision not to construct has solid justification because the aborted facility would have operated daytime-only, would have required a restrictive and complex six tower antenna system, and had a history of zoning problems. The rejected exhibit showed that, in addition, 239 acres would have been required, at a cost of $250,000, and the zoning authority required that this acreage be enclosed by an 8-foot high steel fence, costing approximately an additional $30,000. Also, under terms of a previous settlement agreement with an existing broadcaster an extensive proof-of-performance would have been required to protect that broadcaster's existing station at Xenia, Ohio from harmful electrical interference; and the Commission has recognized that daytime-only AM stations operate under significant economic disadvantages. *See generally Delection of AM Application Acceptance Criteria in Section 73.37(e)*, Report and Order, FCC 85-586, released December 12, 1985. Moreover, if the competitors believed that the failure to construct was born out of bad faith, and not reasonable engineering or economic considerations, they could have sought addition of an appropriate issue. No such showing was proffered.

11. *Worthington's Needs*. Worthington, Ohio (population 15,015), the proposed community of license of Advanced Allied, already has a local transmission service, Station WRFD(AM), which is dually licensed to both Columbus and Worthington. (*I.D.*, para. 27)L. The ALJ further held that because Worthington "is located in the Columbus, Ohio metropolitan area, an urbanized area with a multiplicity of broadcast stations; and although a significant community in its own right, it is one of many in the Columbus area and cannot lay claim to being as important to surrounding areas as the other communities under consideration." *I.D.*, para. 75 (*see also Archilla-Marcocci Spanish Radio Co., supra*).

12. In its exceptions, Advanced Allied argues that Station WRFD(AM) does not really provide in its programming a first local transmission service to Worthington, and that the ALJ erroneously rejected evidence intended to show that WRFD's attentions are focused on the larger community of Columbus to

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allocation for Troy and the six recent applications therefor garner no Section 307(b) consideration because it does not sufficiently ensure that Troy will actually receive such service inthe immediate future. Thus, Union City's Petition to Reopen Record, filed February 29, 1986, is hereby denied.

the detriment of Worthington. Br. at 15–19. It further argues that Worthington is not less important to its surrounding area than the competing communities are to theirs. Br. at 12–15. We deny these exceptions.

13. First, we reject Advanced Allied's attempt to question whether Station WRFD adequatelyserves the transmission or local needs of Worthington. Because the station is licensed to both Columbus and Worthington, it has a conclusive legal duty to act as a local outlet for Worthington as well as for Columbus. 47 CFR § 73.1120. A challenge to the adequacy of Station WRFD's performance of its duties may properly be raised by informal citizen complaint, petition to deny its renewal applications, or in the context of a comparative renewal proceeding, where the penalty for an abdication of licensee responsibilities to its community of license could well be the substitution of a competing applicant. *See, e.g., George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982) (subsequent history omitted). Here, however, the issue is which community has *no* station licensed to serve it and, therefore, the greater need for a first service.

14. Furthermore, and critically, the licensee of Station WRFD is not even a party to this case, and thus was not afforded notice or an opportunity to answer Advanced Allied's self-serving collateral attack upon its record. Indeed, Advanced Allied is at fault for this vital missing link of evidence since it did not seek a separate issue nor proffer a threshold showing regarding the adequacy of Station WRFD's programming for Worthington.[2] *See* Tr. of Oral Arg. at 140. Thus, it utterly failed to meet the long-standing, absolute minimum requirements for the introduction of "programming" evidence in a Section 307(b) proceeding. *See, e.g., Cookeville Broadcasting Co.*, 19 RR 897 (1960); *Chase Communications Co.*, 100 FCC 2d 689, 691–2 n.6, 58 RR 2d 115, 117 n.6 (Rev. Bd. 1985). Accordingly, we must affirm the ALJ's rejection of Advanced Allied's empty, back-door attempt to inject the matter of Station WRFD's programming, which programming is not substantively or procedurally relevant to any issue desig-

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[2] At the hearing, the ALJ rejected Advanced Allied's attempt to introduce evidence purporting to show that Station WRFD's programming did not serve Worthington. See Advanced Allied Exhs. 2, line 7 *et seq.*; 3–5 (rejected); Tr. 72–86. We affirm his ruling. Not only does our review indicate that the rejected exhibits are inadequate to substantiate Advanced Allied's contention, but the proffer fails procedurally as an impermissible submission of "outside programming evidence" not grounded on "a specific issue . . . added 'upon a threshold showing.'" *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 711 (Rev. Bd. 1982).

nated in this case. Insofar as the record shows, WRFD is properly serving as a local transmission outlet for Section 307(b) purposes.

15. *Final Section 307(b) Evaluation.* Three of the remaining applicants, Land O'Lakes, Point Pleasant Broadcasting, and Union City Radio, will supply their respective communities with a first local transmission service whereas Advanced Allied will not. All applicants other than Advanced Allied therefore are entitled to the long-standing presumption that every community of appreciable size needs at least one station for local self-expression. *See Plainview Radio*, 24 FCC 405, 421-3 (1958); *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977). By the same token, Worthington (Advanced Allied's community) is eliminated from further Section 307(b) consideration under the Commission's long-standing AM priorities which conventionally favor communities seeking their first local service over those seeking multiple services. *See, e.g., Alessandro Broadcasting Co.*, 99 FCC 2d 1, 6 (Rev. Bd. 1984). Therefore, we are faced with two alternatives: (1) grant the applications to serve Point Pleasant (pop. 5,682) and Troy (pop. 19,086); or (2) grant those to serve Point Pleasant and Union City (pop. 3,908). The first choice is compelled by the controlling facts and law.

16. Under either alternative, Point Pleasant will receive a grant; thus, the choice is reduced to a comparison between Troy and Union City, which choice is easily resolved in Troy's favor. Troy is the most populous community involved in this proceeding, has civic, cultural, religious, social, and commerical attributes commensurate with its size, and is the seat of Miami County. *I.D.*, paras. 6-14. It is patently more significant than the much smaller community of Union City which, besides having commensurately smaller indicia of community, is not a county seat. See *I.D.*, paras. 39-46. Under well established law, when evaluating the need for local transmission service, "the Commission presumes that the most populous community has the greatest need . . . provided that it has commensurately greater civic, cultural, religious, social, and commercial attributes." *Ruarch Associates*, 99 FCC 2d 338, 341 (Rev. Bd. 1984), *aff'd*, 101 FCC 2d 1358 (1985). Therefore, Troy is firmly favored over Union City.

17. All decisionally significant exceptions have been considered, and we concluded that grant of the Land O'Lakes and Point Pleasant Broadcasting applications for Troy and Point Pleasant,

respectively, will best provide a fair, efficient, and equitable distribution of radio service and thereby serve the public interest.

18. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed February 13, 1986 by Land O'Lakes Broadcasting Corporation IS GRANTED, and the amendment IS ACCEPTED; and

19. IT IS FURTHER ORDERED, That the applications of Land O'Lakes Broadcasting WTRJ (AM) (File No. BP-820720AK) and Point Pleasant Broadcasting Company (File No. BP-821122AD) ARE GRANTED; that the application of WPTW Radio, Inc. WPTW (AM) (File No. BP-821014AA) IS DISMISSED; and that the applications of Advanced Allied Communications Technologies, Inc. (File No. BP-821122AC) and Union City Radio (File No. BP-821122AG) ARE DENIED; and Union City Radio's petition to reopen record filed February 28, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAND O'LAKES BROADCASTING CORPORATION WTRJ(AM) **Troy, Ohio**	**MM DOCKET NO. 84-481** **File No. BP-820720AAK**
WPTW RADIO, INC. WPTW(AM) **Piqua, Ohio**	**MM DOCKET NO. 84-484** **File No. BP-821014AA**
ADVANCED ALLIED COMMUNICATION TECHNOLOGIES, INC. **Worthington, Ohio**	**MM DOCKET NO. 84-486** **File No. BP-821122AC**
VERNON H. BAKER d/b/a POINT PLEASANT BROADCASTING COMPANY **Point Pleasant, West Virginia**	**MM DOCKET NO. 84-487** **File No. BP-8211221D**
EDWARD A. BAKER d/b/a UNION CITY RADIO **Union City, Indiana**	**MM DOCKET NO. 84-489** **File No. BP-821122AG**
For Construction Permit	

Appearances

Lauren A. Colby and *Arthur V. Belendiuk* on behalf of Land O'Lakes Broadcasting Corporation; *Mark E. Fields* on behalf of WPTW Radio, Inc.; *Donald E. Martin* on behalf of Advance Allied Communication Technologies, Inc.; *Julian P. Freret* on behalf of Point Pleasant Broadcasting Company; *Christopher D.*

Imlay on behalf of Union City Radio; and *Linda R. Figueroa* and *Arthur I. Steinberg* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: August 23, 1985; Released: August 29, 1985

Preliminary Statement

1. Orginally this proceeding included eleven applications for eleven communities in seven different states. Three applications were dismissed[1] and three were granted,[2] leaving the five applications listed in the caption.

2. The Hearing Designation Order was released on May 24, 1984. The only issues specified that are applicable to the applicants remaining in the case are the following:

> 1. To determine whether there is a reasonable possibility that a hazard to air navigation would occur as a result of the tower height and location proposed by Vernon H. Baker d/b/a Point Pleasant Broadcasting Company.
>
> 2. To determine the areas and populations that would receive primary service from each proposal and the availability of other primary aural services to such areas and populations.
>
> 3. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended which of the proposals (or combination of proposals) would best provide a fair, efficient, and equitable distribution of radio service.
>
> 4. To determine, in the event it is concluded that choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. Issue 1, the air hazard issue against Point Pleasant Broad-

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[1] El Sol Broadcasting, Inc. (Docket No. 84-479), *Order*, FCC 85M-505 released February 1, 1985; S.W. Ohio Broadcast Service (formerly Mid-Florida Television Corporation) (Docket No. 84-485) *Order* FCC 85M-2619 released June 26, 1985; Radio Harlan, Inc. (Docket No. 84-483) *Order*, FCC 84M-2592 released June 8, 1984).

[2] Midwest Broadcast Associates, Ltd. (Docket No. 84-480), *Order*, FCC 85M-505 released February 1, 1985; Juarez Communications Corp. (Docket No. 84-482) *Order*, FCC 85M-1037 released March 12, 1985; Radio One, Inc. (Docket No. 84-488), *Order* FCC 85M-2619 released June 26, 1985.

casting Company, was resolved by summary decision in favor of the applicant. *Order*, FCC 84M-3161 released July 18, 1984. With respect to the contingent comparative issue, it was agreed that only in the case of Land O'Lakes Broadcasting Corporation and WPTW Radio, Inc., who have applied for Troy, Ohio and Piqua, Ohio respectively, could this issue conceivably be applicable, and evidence under the issue was received only with respect to these two applicants.

4. Prehearing conferences were held on July 23, 1984 and October 23, 1984; a hearing was held on March 12, 1985; and on the same day the record was closed. Proposed findings of fact and conclusions were filed on May 2, 1985 and replies thereto were submitted on May 23, 1985.

Findings of Fact

Land O'Lakes Broadcasting Corporation (Land O'Lakes)

5. Land O'Lakes proposes to operate on the frequency 1030 kHz with 0.5 kW of power, daytime only.[3] Troy Ohio is its proposed community of license.

6. *Troy, Ohio*. Troy is a community of 19,086 persons (1980 Census) and is the county seat of Miami County, Ohio (population: 90,381). Troy is situated 20 miles north of the city of Dayton and 30 miles east of the Indiana-Ohio boundary line in western Ohio (Land O'Lakes Ex. 3, pg. 1). Troy has no existing broadcast station.[4] The only radio stations presently operating in Miami County are WPTW and WPTW-FM, located in Piqua, Ohio. Piqua is located about eight miles north of Troy.

7. The City of Troy operates under the statutory form of government, with an elected mayor, city council, and city council president. Voters also choose an auditor, treasurer, and law director. The mayor appoints the city's safety-service director. This professional administrator oversees the growth and operation

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[3] Its original proposal for 2.5 kW was amended in order to remove an engineering conflict. *Order*, FCC 84M-4567, released October 25, 1984.

[4] The caption in the HDO indicates that the Land O'Lakes application is for modification of an existing facility: 1510 kHz, 0.25 kW, DA-D. However, the permit for that facility was to expire on March 15, 1983, more than a year before the HDO was adopted. Land O'Lakes Ex. 2, p. 3. For this reason Point Pleasant moved to dismiss the application. Its request was denied on the ground that the ALJ is without authority to, in effect, reconsider a decision made under delegated authority to designate an application for hearing. *Order*, FCC 84M-3500, released August 13, 1984. Section 1.115(e)(3) of the Rules specifies a procedure for challenging a delegated action of this nature, but no application for review pursuant to that Rules was ever filed. The status of the Land O'Lakes application in this proceeding is discussed at paras. 58-66, *infra*.

of the city. The city has developed a master plan to help direct future growth and has encouraged the downtown historic architectural district to help preserve the city's character (Land O'Lakes Ex. 3 p. 1).

8. Troy keeps 30 full-time officers in both its police and fire departments, and operates its own ambulances and emergency crew, including a staff of paramedics. The Troy Emergency Crew is a volunteer organization that provides non-emergency medical transportation and back-up to the city emergency crews (Land O'Lakes Ex. 3, pg. 1).

9. The city is also the seat of Miami County government, led by a three-member Board of County Comissioners. The Miami Country Sheriff's Department, the County Court House and the County Human Services Building are also located in Troy. (Land O'Lakes Ex. 3, pg. 2).

10. The largest employer in the City of Troy is the Hobart Corp., which manufactures KitchenAid home appliances and employes more than 2,500 persons. The next largest employer, a manufacturer of arc welding systems and welding filler metals, employs 1,800 persons. The company also manufactures aircraft ground power units and industrial battery chargers (Land O'Lakes Ex. 3, pg. 2).

11. Other manufacturers in Troy include Brown-Bridge Mills, a division of Kimberly-Clark; the Troy division of the St. Regis Paper Company, which produces gummed paper, tape, and other paper products; Keyes Fiber, producer of polystyrene foam package containers; the Midwest center of the Friendly Ice Cream Corp.; Dinner Bell Foods, Inc., a beef and pork processor; and Tube Products Corp., manufacturer of tail and exhaust pipes (Land O'Lakes Ex. 3, pg. 2).

12. There is a daily newspaper in Troy which publishes five afternoons a week and Saturday morning. The paper has a circulation of 10,788 persons (Land O'Lakes Ex. 3, pg. 3).

13. There are 30 churches of various denominations situated in the community, a public library, six elementary schools, a junior high school, a high school, a joint vocational school, two parochial schools, a school for the developmentally disabled, and a school of welding technology (Land O'Lakes Ex. 3, pg. 3).

14. There are seven banks and/or savings and loan associations situated in the city, as well as two hospitals, 20 city owned parks, a municipal stadium seating 10,000, a country club, and a municipal golf course (Land O'Lakes Ex. 3, pg. 3). The community also has various clubs and organizations such as the Chamber of

Commerce, Eagles, Jaycees, Kiwanis, and American Legion (Land O'Lakes Ex. 3, pgs. 3-4).

15. *Engineering Considerations*. Operating as proposed (1030 kHz, 0.5 kW, D.), the Troy station will serve the following areas and populations:

CONTOUR	*POPULATION*	*SQUARE MILES*
2.0 mV/m	613,347	1,438
0.5 mV/m	918,041	6,163

All portions of the service area of the proposed station receive at least five aural broadcast services (Land O'Lakes Ex. 1, pg. 1).

WPTW Radio, Inc. (WPTW)

16. WPTW is applying to change the frequency of AM Station WPTW, Piqua from 1570 kHz with a power of 0.25 kW to 1030 kHz at 1 kW. The proposed station, like the existing one, would be a daytime only facility.

17. *Piqua, Ohio*. Piqua is an incorporated city, and with a population of 20,480 (1980 U.S. Census) it is the largest city in Miami County. Piqua has a five-member city commission, which chooses the city manager. Among the services the city provides to residents is a municipal electric service. The city government also provides police and fire protection, sanitation and health services, parks, streets, and water and sewage services. Piqua has a library and a hospital, and is the site of a two-year state college (Edison State College) with over 3,000 students. Piqua has a large public high school, a vocational school and junior high and elementary schools, as well as five private schools. Over 40 churches of 25 different denominations are also located there (WPTW Radio Exhibit 2,).

18. The city has numerous civic and voluntary clubs and organizations, including Kiwanis, Lions, Rotary and other service clubs; garden clubs; mothers' clubs; lodges, including Eagles, Elks, Knights of Columbus, B''Nai B'Rith and others; veterans' organizations, including American Legion and DAV; luncheon clubs Jaycees; youth clubs; service organizations, including Red Cross, Boy Scouts, Meals on Wheels, Salvation Army, USO, YMCA, and YWCA; historical society; DAR; and United Fund (WPTW Radio Exhibit 2, page 42).

19. Major employers in the city (more than 250 employees) include the following: Aerovent — industrial fans and heating equipment; Hartzell Industries — veneer and hardwood lumber, carving tools; Medalist Allen-A Co. — sportswear and outerwear;

Miami Industries (div. of MSL Industries) — welded steel tubing; Questor Juvenile Furniture Co. — baby beds, car seats & accessories; and TRW Hartzell Propellor Prod. — aircraft propellers and accessories. Numerous smaller companies are also located there. (WPTW Radio Exhibit 2, page 4).

20. Piqua has two radio stations, both owned by WPTW Radio, Inc. They are AM Station WPTW (seeking to change its frequency in this proceeding), and WPTW-FM, operating on 95.7 MHz with power of 50 kilowatts. Piqua has a daily newspaper, the *Daily Call* (WPTW Radio Ex. 2, page 4).

21. *Engineering Considerations*. The proposed change in frequency will result in an increase in area served by Station WPTW within the 0.5 mv/m contour from 1,919 sq. mi. to 9,406 sq. mi., resulting in a gain of 7,487 sq. mi. The population served will be increased from 205,475 to 924,599 persons, resulting in a gain of 719,124 persons (WPTW Ex. 1, pg. 5). As with the other applicants, all portions of the gain area receive at least five existing aural services (WPTW Radio Ex. 1, pgs. 3 & 7).

Advanced Allied Communication Technologies, Inc. (AACT)

22. Ralph V. Destefano and Johanna S. DeStefano, Joint Venturers, filed application for a new AM station to operate on 1030 kHz with 2,500 watts daytime-only at Worthington, Ohio. The joint venturers subsequently incorporated under the name Advanced Allied Communication Technogies, Inc. (AACT) and substituted the corporation for themselves as the applicant herein. It was discovered several months after the adoption and release of the *Hearing Designation Order* that AACT's proposal was mutually exclusive with an authorized station in North Ridgeville, Ohio. In order to resolve this conflict, AACT amended its application so as to reduce the proposed power to 250 watts. This amendment was accepted. *Order*, FCC 85M-110 released January 10, 1985.

23. *Worthington, Ohio*. Worthington has a population of 15,015 people and is part of the Columbus, Ohio metropolitan area. It operates with the City Council/Manager form of government. Other city agencies which participate in governing the community are the Municipal Development Commission, the Board of Zoning Appeals, the Parks and Recreation Advisory Board, and a Community Relations Commission. Worthington has its own Department of Safety with 28 sworn officers and 14 reserve

officers. The city also has a fire department (AACT Ex. 1).

24. Worthington is the location of numerous industrial operations, including Worthington Industries, Liebert Corporation, Ohio Medical Indemnity, ChemLawn, Anheiser Busch, and National Water Well. The Huntley Industrial Park provides a place for light industrial research and warehousing. Products manufactured in Worthington include plastics, industrial abrasives and diamonds, scales, metal cans, fabricated and primary metals, textured protein foods, surgical and medical instruments, prefabricated wood, bulk handling equipment, gears and speed reducers, rubber and plastic hoses, precision machined parts, and transportation and electrical equipment. Service companies, such as Equitable Life Assurance Company and Combibloc have established offices in Worthington (AACT Ex. 1).

25. Worthington has an active Chamber of Commerce, with members from all segments of the business community. The central business district of Worthington still provides an important center for shopping and commerce. Heavy retail activity flourishes too at more recently developed malls. There are some 21 churches in the community. Worthington has its own health and social service organizations such as the Worthington Community Counseling Service, the Worthington Resource Center, The Worthington Community Service Committee, Harding Hospital, The United Methodist Children's Home, and the North Area Guidance Center. The Department of Parks and Recreation offers over 150 programs for residents each quarter. The city maintains 13 neighborhood parks and 18 lighted tennis courts. There are facilities for other recreational activities such as swimming, biking and fishing. In addition, the Worthington Arts Council promotes activities and events involving the visual and performing arts. Worthington also has an award-winning community theatre group and a civic band (AACT Ex. 1).

26. Worthington's education system provides schooling to some 7,400 students. The school system is growing at the rate of 150–200 students per year. About 42% of the students in the Worthington School District come from the City of Columbus under the terms of a 1968 agreement with the Columbus Board of Education. Other participants include the Village of Riverlea and portions of Sharon and Perry Towships (AACT Ex. 1).

27. Worthington has no television or FM broadcast station licensed to it. However, WRFD, an AM daytime-only station, is

licensed to Columbus/Worthington (AACT Ex. 2).

28. *Engineering Considerations*. Operating as proposed, the station will serve 1,120 sq. mi. and 1,185,815 persons within its 0.5 mV/m contour (AACT Ex. 6, p. 8). All portions of the AACT service area have at least five existing aural broadcast services.

Point Pleasant Broadcasting Company (PPBC)

29. PPBC proposes to operate on 1030 kHz in the community of Point Pleasant, West Virginia with a power of 10 kW daytime only using a directional antenna.

30. *Point Pleasant, West Virginia*. Point Pleasant is located in Mason County, West Virginia on the banks of the Ohio and Kanawha Rivers. It is the county seat of Mason County and has a population of 5,682 (1980 Census).

31. The community has a bi-partisam mayor-council form of government, including eight ward representatives and two councilmen at large and an elected city clerk. City government departments include a city attorney, street department, sewer department, water department, recreation department, floodwall department, sanitation department, police department and a city inspector (Point Pleasant Ex. 1, pg. 3).

32. The police force includes ten police officers and five vehicles. County sheriff and deputies protect unincorporated nearby communities. The West Virginia Department of Public Safety is headquarted in Point Pleasant. Fire protection is provided by forty-two volunteer firemen, four city-employed emergency officers, nine fire-fighting vehicles and several other rescue vehicles. The main fire department is located in the city building with a substation in the north end of the city. Hospital facilities include the Pleasant Valley Hospital with 128 beds and the Pleasant Valley Nursing Care Unit with 100 beds. There are also three clinics in the community (Point Plesant Ex. 1, pp. 3-5).

33. Rail transportation is provided by the Kanawha secondary line of Conrail and the Ohio Valley Division of the Chessie System railroads. Six interstate truck lines serve Point Pleasant. Several barge lines serve the city on both the Ohio and Kanawha Rivers. Greyhound buses pick up and deliver passengers at Point Pleasant and a number of airports are nearby. U.S. Route 35 and State Routes 2 and 62 provide access to other major highways (Point Pleasant Ex. 1, pp. 5, 6).

34. Industries in the area include Stauffer Chemical Company, Goodyear Tire & Rubber Co., Foote Mineral Co., Philip Sporn Power Plant, Point Pleasant Marine Co., Power Distribution

Products, Mountaineer Power Plant, and B&O Machine Repair. There are two full-sized banks in Point Pleasant and one minibank (a branch of one of the larger banking facilities), as well as a savings and loan institution. The Point Pleasant-Mason County Chamber of Commerce, located in Point Pleasant, boasts seventy-four members; and seventy-six businesses are located in Point Pleasant (Point Pleasant Ex. 1, pp.8, 9, 13-18).

35. Within the city, there are three elementary schools with a total of 1,016 students, one junior high with 803 students, one high school with 726 students, and a vocational technical school with 555 students. There are forty-one churches in Point Pleasant and the city has a new 20,000 volume public library used also for community functions. There are two city-owned recreational areas, one of eighteen acres, the other of fourteen acres, with a twenty-two-acre lake and historical area. Fishing, picnic facilities and playgrounds are available. The city has new twenty-five-meter public swimming pool, a 5,000-seat lighted football stadium, a 2,000-seat lighted football and baseball park, three lighted baseball parks, and a youth center. Forty-nine clubs and service organizations are represented in Point-Pleasant and fifty-eight in the entire county.

36. A daily newspaper is published in Point Pleasant but no radio or television stations are licensed to it. One cable television system serves the city.

37. *Engineering Considerations*. Operating as proposed, the Point Pleasant station will serve 4,188 sq. mi. and 246,495 persons within its proposed 0.5 mV/m contour (Point Pleasant Ex. 2, pg. 2). All portions of the service area receive at least five existing aural broadcast services (Point Pleasant Ex. 2, pg. 1).

Union City Radio (UCR)

38. UCR proposes to operate in Union City, Indiana on 1030 kHz with a power of 1 kW daytime only using a directional antenna.

39. *Union City*. Union City is an incorporated community located on the Ohio/Indiana border approximately thirty miles east of Muncie, Indiana in Randolph County. The population in 1980 was 3,908 persons (Union City Ex. 1, p. 1).

40. Union City has a mayor/city council form of government, with five council members, a mayor, a clerk-treasurer, a city attorney, a chief of police, a fire chief, a city judge, a four-person park board, a three-person water works board, a four-person cemetery board, a county zoning administration, a county zoning

appeals board, and a county planning commission. The fire department has three pumpers, one equipment van, five full-time firefighters and eighteen volunteers. The police department includes three patrol cars, seven full-time police officers, three "extra" (reserve) officers, and four radio dispatchers (Union City Ex. 1, p. 2).

41. There are three schools in Union City, Indiana: a high school (368 students), a middle school (354 students), and an elementary school (438 students). The city has one fifty-bed hospital, a fifty-bed nursing home, two ambulances, one rescue ambulance, and two full-time and twenty-two volunteer emergency medical technicians. Union City provides its own sewage treatment and water, the latter with a three million gallon-per-day surplus. Municipal services are funded by the city's property taxes (Union City Ex. 1, p. 3).

42. Union City has a 25,000 volume library, an eighty-acre municipal park with swimming, six tennis courts, three ball fields, a horse track, and seven shelter houses. There are in addition four little league ball fields. A senior citizens' center provides social and recreational events (Union City ex. 1, pp. 3, 4).

43. The city has more than seventeen clubs and service organizations, an Economic Development Commission and fifteen churches.

44. Industries in Union City includes Sheller-Globe Corp. (530 employees), Triangle Pacific Corp. (209 employees), Union City Body Company (844 employees), Westinghouse Electric (314 employees), Union City Mold & Die Cast Corporation (Seventy employees), and C.W. Rice Company (twenty employees). Local chapters of national labor unions operate in the city. Commercial businesses include three supermarkets, twelve restaurants, two variety stores, two drug stores, eleven garages, four clothing stores, four taverns, eight contractors, and two print shops. Union City has three banks and one savings and loan institution (Union City Ex. 1, pp. 5, 6).

45. Nearby airports and the Conrail B Line Railroad and Fort Wayne Line Railroad provide air and rail transportation service. Twelve common and five contract carriers provide daily freight trucking operations. Indiana Routes 32 and 28 and Ohio Routes 47 and 571 enter Union City and connect with major interstate highways (Union City Ex. 1, p. 6).

46. Union City has no local daily or weekly newspaper, nor a local radio or television station (Union City Ex. 1, pp. 6, 7).

47. *Engineering Considerations*. Operating as proposed, UCR's station will serve 10,482 sq. mi. and 904,853 persons within its 0.5 mV/m contour. All portions of the service area receive at least five existing aural broadcast services (Union City Ex. 2, pg. 2).

Engineering Interrelationships

48. While all five applicants are joined together by various engineering conflicts, the applications are not all mutually exclusive with each other. Various alternatives exist which would permit a grant of two applications rather than one. These are shown in the following table:

If This Application Is Granted	*Then This Application Can Also Be Granted:*	*No. Of Applications Grantable:*
A. Land O'Lakes Broadcasting Corporation Troy, OH	Point Pleasant Broadcasting Co. Point Pleasant, WV BP-821122AD	2
B. WPTW Radio, Inc. Piqua, OH	None	1
C. Advanced Allied Communication Technologies Worthington, OH	None	1
D. Point Pleasant Broadcasting Company Point Pleasant, WV	Land O'Lakes Broadcasting Corporation OR Union City Radio Union City, IN	2
E. Union City Radio Union City, IN	Point Pleasant Broadcasting Co. Point Pleasant, WV	2

Comparative Issue (Land O'Lakes and WPTW)

49. The only communities involved in this proceeding where Section 307(b) considerations might not be dispostive are Piqua and Troy, which are approximately eight miles apart. Accordingly, Land O'Lakes and WPTW submitted evidence under the contingent comparative issue.

50. *Land O'Lakes*. Land O'Lakes is an Ohio corportion, the stock of which is owned in three equal parts by the following persons: James Granitsas, President; William R. Coffey, Vice President; Nicholas Theodosopoulos, Secretary/Treasurer.

51. Each of these principals is presently a resident of Cambridge, Ohio. If Land O'Lakes is granted a construction permit, Mr. Coffey will move to Troy and become the full-time

(more than 40 hours per week) general manager of the proposed radio station. No integration credit is sought for the other two principals.

52. Mr. Coffey was the general manager of Radio Stations WILE(AM) and FM in Cambridge. The stations were owned by a sister corporation, Cloverleaf Broadcasting Corporation, from 1968 to 1983. Mr. Coffey claims broadcast experience for his service as general manager of these stations. At the present time, he is studying broadcasting and communications at Akron University, working towards an M.S. degree.

53. Neither Land O'Lakes nor any of its principals have any other broadcast interests, nor do they thave any interests in newspapers, cable sytems or other media of mass communications.

54. To insure continuity of service in the event of power interruptions applicant will install auxiliary power equipment.

55. *WPTW*. WPTW Radio, Inc. is an Ohio corporation. All of the outstanding stock is owned by Richard E. Hunt Trust, of which Richard E. Hunt is trustee. Members of his family are the beneficiaries. Richard E. Hunt is president of the corporation, and is a director.

56. Mr. Hunt was born in Troy in 1919 and, except for duty in the U.S. Maritime Service during World War II, he has been engaged in broadcasting since 1940. In 1947 he became the owner and general manager of WPTW, and in 1960 he established WPTW-FM. Over the years he acquired ownership interests in several other stations, none of which he now owns. Mr. Hunt presently resides in Stuart, Florida but spends the equivalent of two months per year in Piqua. He continued to oversees the operation of WPTW and WPTW-FM.

57. In addition to owning WPTW and WPTW-FM, Mr. Hunt is also retained as a consultant by stations in Cheboygan and Sault Ste. Marie, Michigan in which he formerly held ownership interests.

Status of Land O'Lakes Application

58. Before turning to the conclusions, consideration must be given to the peculiar status of the Land O'Lakes application. A brief reference to the matter was made in n. 4, *supra*, but a more detailed discussion is warranted in view of the importance of the matter to the outcome of the case.

59. The crux of the problem is that the Land O'Lakes application was designated for hearing as an application to modify an outstanding construction permit, whereas it appears the permit was due to expire by its own terms some 14 months earlier. Land O'Lakes contends that its application should be treated as an application for a new facility, one that would provide the designated community of Troy with its first local outlet. The other parties contend that this approach is disingenuous; that Land O'Lakes must be treated as an application for modification of an existing permit, as it originally proposed and as the caption in the HDO indicates, in which case Troy would be credited with an outstanding authorization; or, if there is no outstanding permit, then the application must be rejected because there is nothing to modify. The following background information provides a context for considering these contentions.[5]

60. On June 28, 1976, Cloverleaf Broadcasting Corporation (Cloverleaf) filed an application (File No. BP-20,450) for a construction permit for a new AM broadcast station to operate on the frequency 1510 kHz with power of 250W, directional, daytime-only, employing a six tower directional antenna system at Troy, Ohio. The application was granted on February 15, 1979, and the call letters WTRJ were assigned to the permittee. Because of zoning difficulties and economic problems the station was never built.

61. On July 20, 1982, Cloverleaf filed an application for a change in the facilities of Station WTRJ to specify non-directional operation on the frequency 1030 kHz with power of 2.5 kW, daytime-only. Thereafter, the application was amended to substitute Land O'Lakes Broadcasting Corporation as the applicant.[6]

62. On December 30, 1982, Land O'Lakes filed an amendment to its application, indicating that it did not intend to extend its construction permit for 1510 kHz at Troy and asking that its application for 1030 kHz be treated as an application for a new facility (The construction permit was to expire by its own terms on March 15, 1983). The amendment was accompanied by a letter from counsel which stated:

> This amendment is tendered on the specific condition that it not be considered major change [sic] and, that it not result in the assignment of a new file number. In the event the Commission disagrees or believes, for

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[5] The information is derived from Land O'Lakes Ex. 2 and attachments to Land O'Lakes petition to amend filed with the presiding officer on June 19, 1984.

[6] Like Cloverleaf, Land O'Lakes is owned in three equal parts by Messrs. Coffey, Theodosopoulos and Granitsas.

> any reason, that the amendment requires the assignment of a new file number, applicant does not desire to submit the amendment.

On May 4, 1984 the Chief, AM Branch, Audio Services Division rejected the amendment, stating:

> This is in response to your amendment filed on December 30, 1982 to the above captioned application. Good cause has not been shown for acceptance of this amendment; consequently, as you have requested, the amendment is being returned to you.

Less than three weeks later, the application, along with ten others, was designated for hearing. In the caption the application is described as one for a modification of an existing authorization. Thereafter, an amendment identical to the one rejected by the Bureau was denied by the presiding officer. See n. 4, supra and the *Order* cited therein.

63. The "A" cut-off date in this proceeding was November 22, 1982. Thus the Cloverleaf, i.e. Land O'Lakes, application to change facilities was timely filed. The amendment requesting that it be treated as an application for a new station, however, was filed more than a month after the date for accepting new applications had passed. Moreover, any major amendment in a pending application before or after the cut-off would require assignment of a new file number and reprocessing, eliminating it from consideration with the other applicants in this proceeding. See Sections 73.3522, 73.3571, 73.3580. This is presumably the reason for the "condition" under which the application was tendered and a reason why it was rejected by the Audio Services Division.

64. The sequence of events described above suggests that Land O'Lakes had by the end of 1982 no intention to construct a facility on 1510 kHz and hoped to exploit the fact by using it as a reason for converting its pending application for modification into an application for a new facility, thereby obtaining a more favored position for its 1030 kHz application, it being generally accepted that a Section 307(b) comparison between an application to improve facilities and one for a new station in a different community that has no local outlet tends to favor the latter. Regardless of the motive, however, the presiding officer is persuaded that Land O'Lakes' attempt to convert its original proposal into an application for a new facility while retaining its comparative standing in this proceeding cannot be countenanced.

65. Land O'Lakes' contention that its position merely reflects reality is not persuasive. In the first place the effect of the expiration of the original construction permit is not as clear as Land O'Lakes would have it. It is "well-settled that a construction permit does not 'lapse', nothwithstanding a failure to abide by its terms, until the Commission declares it forfeited." *MG-TV Broadcasting Company* v. *FCC*, 408 F.2d 1257, 1261 (D.C. Cir. 1968). *See also Mass Communicators, Inc.* v. *FCC*, 266 F.2d 681 (D.C. Cir. 1959) (expiration of a permit is not to be considered an automatic forfeiture unless and until the Commission has exercised its discretion to extend it.) Arguably, the Bureau's action designating the modification application for hearing constituted by implication a discretionary extension of the permit; otherwise, it is difficult to understand why the application wasn't dismissed. But assuming arguendo that the permit no longer exists, this is a circumstance over which Land O'Lakes had some control. Having decided not to construct in accordance with the original permit, Land O'Lakes' claim to preference as an applicant who will bring a first local service to the community rings hollow; it represents not an appeal to reality but an attempt to bootstrap its application into a more favorable position in relation to the other applicants. Its predesignation amendment was rejected, and its post-designation petition to amend, in addition to seeking a result that would be highly prejudicial to the other applicants, provided no facts that were not before the Bureau when it declined to designate the application as a proposal for a new facility. If its application is to be considered at all, it must be as an application to modify an existing authorization.

66. It is recognized that as a consequence of this result Troy must be attributed with an outstanding authorization, thus diminishing the likelihood of its being assigned a station in this proceeding. Some consolation, however, may be derived from the fact that the Commission has recently allocated an FM channel to the community thus holding out the prospect of a local station in the not too distant future. *FM Channel Assignment (Increased Availability)*, 57 RR 2d 863, 877 (1985).

Conclusions

Areas and Populations.

67. Recapitulating the findings, the areas and populations which will receive a reception service (0.5 mV/m signal) from the various applicants are as follows:

Applicant	*Area (square miles)*	*Population*
Land O'Lakes	6,163	918,041
WPTW	7,487[7]	719,124[7]
AACT	1,120	1,185,815
PPBC	4,188	246,495
UCR	10,482	904,853

68. When the grant combinations set forth in para. 48 are considered, the figures are as follows:

Combination	*Area*	*Population*
Land O'Lakes and PPBC	10,351	1,164,536
WPTW	7,487	719,124
AACT	1,120	1,185,815[8]
PPBC and UCR	14,670	1,151,348

69. Using the second table, which provides the more relevant comparison, it can be seen that except for WPTW there is little difference in the populations that would receive a new service from the various proposals. Moreover, all of the areas and populations are already "well served" receiving at least five reception services from existing facilities. *Archilla-Marocci Spanish Radio Company*, FCC 85R-63, released August 2, 1985 (Rev. Bd.).

Section 307(b) Issue

70. Section 307(b) of the Communications Act requires the Commission in acting on broadcast applications, to provide "a fair, efficient and equitable" distribution of broadcast service among the various states and communities throughout the country. In implementing this mandate the Commission traditionally seeks to determine the relative need of each applicant's proposed service area for a new reception service and the relative need of each applicant's specified community for a new transmission outlet. *Archilla-Marocci Spanish Radio Company, supra.* It is evident from the data set forth in the preceding section that the need for new reception service is not a decisional factor in this case since all the areas to be served received at least five services,

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[7] These figures represent the net gain that would result from the applicant's proposed change in frequency and power, i.e. proposed service minus existing service.

[8] It is noted that AACT's high figure relative to the small area it would cover stems from the fact that Worthington, the proposed city of license is a suburb of Columbus, Ohio.

and are thus by the Commission's standard, already well served. This case thus turns on the relative need of the specified communities for a new transmission service.

71. When evaluating the need for local transmission service "the Commission presumes that the most populous community has the greatest need . . . provided that it has commensurately greater civic, cultural, religious social and commercial attributes." *Ruarch Associates*, 99 FCC 2d 338, 341 (Rev. Bd. 1984). As this language indicates size is not the sole criterion, but since it provides a useful benchmark the communities involves in this proceeding will be considered in that order.

72. *Piqua, Ohio*. WPTW RAdio, Inc. has applied for Piqua. The community has a population of 20,480 and, as the findings show, it possesses most of the attributes of a small to mid-sized city somewhat removed from large metropolitan areas. It is also the only community in this proceeding which has two existing stations, WPTW-AM and WPTW-FM. The applicant is the licensee of both stations, and under its proposal the AM station would increase its power and shift to a different frequency. Like all of the applicants, its proposl is for a daytime only facility. Notwithstanding this operational improvement, Section 307(b) virtually precludes a grant of the application since two of the communities have no local station, a third has been credited with an authorized facility and the fourth has a station with a dual city identification. Moreover, a grant to Piqua would foreclose a grant of any other application since WPTW's proposal is mutally exclusive with all four.

73. *Troy, Ohio*. Land O'Lakes has applied for Troy, a community of 19,086. Troy is the county seat of Miami County, which has a population of 90,381. In addition to being the site of various county governmental, legal and human services facilities, Troy has a local form of government which provides numerous municipal services. The community has seven banks, 30 churches and a variety of civic and service organization. In addition, numerous manufcturing concerns have located plants there. Situated eight miles from Piqua, Troy has no local broadcast facility.

74. Troy's claim under Section 307(b) is clouded by the ambiguous status of Land O'Lakes, the applicant for this community. Its application was accepted as a request to modify an existing facility. As such the Land O'Lakes proposal cannot be regarded as providing a first local outlet or a new local service,[9] a

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[9] See paras. 58-66, *supra*.

consideration that detracts significantly from Troy's position vis-a-vis all of the other communities except Piqua. It should be noted, however, that a grant to Troy would make possible a grant of the application for Point Pleasant, West Virginia, a community without a local facility.

75. *Worthington, Ohio*. The applicant for Worthington is AACT. The city has a population of 15,015 and possesses the civic, cultural, social and commercial attributes one would normally associate with a community of that size. However, several factors militate against a grant to Worthington. First of all, it is located in the Columbus, Ohio metropolitan area, an urbanized area with a multiplicity of broadcast stations; and although a significant community in its own right, it is one of many in the Columbus area and cannot lay claim to being as important to surrounding areas as the other communities under consideration. Secondly, WRFD(AM) is presently licensed to Columbus-Worthington, so it cannot be said that the community is entirely without a local outlet. Finally, the Worthington application like that for Piqua, is mutually exclusive with all other applicants in the proceeding so that a grant to Worthington would require the denial of all remaining applicants.

76. *Point Pleasant, West Virginia*. Point Pleasant, the community of license specified by PPBC, is realtively small (5,682) but is a county seat. Its city government provides municipal services to its residents and in some instances to unincorporated nearby communities. It also possesses social and commercial attributes typical of a community of its size, and it does not lie close to or within a larger urbanized ara. It presently has no local station, and a grant of PPBC's application would permit a grant to Troy or Union City.

77. *Union City, Indiana*. Union City is an incorpoated community with a population of 3,908, making it the smallest community in the proceeding. It is located in a rural area, and the city government provides various municipal services. There are three schools, a hospital and a library as well as a number of commercial and industrial establishments. The city has no local broadcast station. A grant to Union City Radio would permit a grant to PPBC in Point Pleasant as well.

Summation — Section 307(b)

78. The Commission's allocations priorities for aural broadcast service may be summarized as follows: (1) first full-time aural service; (2) second full-time aural service; (3) first local service;

(4) other public interest matters. See *Alessandro Broadcasting Company*, 99 FCC 2d 1, 6 (Rev. Bd. 1984) and the cases cited therein. The first two are not relevant here in view of the abundance of service available in the coverage areas of the respective applicants and the fact that this case involves daytime service only. The governing priority is therefore the provision of a first local service to as many independent communities as possible.

79. There are two communites here without a local service, Point Pleasant, West Virginia and Union City, Indiana. Piqua, Ohio has two stations Worthington has one station with dual city identification and Troy, for reasons previously discussed, is credited with an authorization for a station. Though smaller than the other communities, both Point Pleasant and Union City are distinct self governing cities located in rural areas and possessing industrial and commercial establishments, churches and civic organizations. In addition Point Pleasant is the county seat of Mason County and also provides municipal services to several smaller communities in the immediate area. Moreover, a grant to either community would make possible a grant to the other because the applications of PPBC (Point Pleasant) and UCR (Union City) are not mutually exclusive.

80. It is evident, particularly in light of the Review Board's recent decision in *Archill-Marocci, supra*, that the fullest implementation of the objectives of Section 307(b) of the Act would be achieved by a grant to these communities. They are to be favored over Worthington because the latter is not entirely without a local metropolitan complex; they are favored over Piqua because the community has two stations and the applicant seeks only to expand an existing service;[10] and they are preferred over Troy because the application for that community is also one for a modification of facilities (if it is a viable application at all).

Contingent Comparative Issue

81. This issue is of no relevance to the case. It concerns only the applications of Land O'Lakes (Troy) and WPTW (Piqua), neither of which is being granted. Moreover, the record is clear that if a choice were to be made between the two, it should be based on Section 307(b) considerations. *Public Service Broadcasting of West Jordan, Inc.*, 97 FCC 2d 960, 962 (Rev. Bd. 1984). In

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[10] Moreover, a grant to either the Piqua or Worthington applicant would preclude a grant to any other community.

accordance with the usual practice, however, conclusions with respect to the issue will be set forth.

82. The principals of Land O'Lakes have no media interests apart from their ownership in Land O'Lakes. WPRT's sole owner is the Richard E. Hunt Trust of which Richard E. Hunt is the sole trustee. Thus both WPTW(AM) and WPTW(FM) are attributable to the applicant for diversification purposes. In the circumstances Land O'Lakes is entitled to a diversification purposes. In the circumstances Land O'Lakes is entitled to a diversification preference.

83. A one-third owner of Land O'Lakes would be the general manager of the proposed station, working fulltime in this capacity. WPTW claims integration credit for the participation of Richard E. Hunt in the station's operation. This integration is not cognizable since Hunt spends ten months of the year in Florida. While he may perform some oversight functions, his role is clearly not one of active full-time participation in the day-to-day operation of the station. Land O'Lakes is to be preferred under this criterion as well.

84. In sum if the comparative issue were relevant to this proceeding, the Land O'Lakes application would be preferred over that of WPRT.

Ultimate Conclusion

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the applications of Point Pleasant Broadcasting Company and Union City Radio ARE GRANTED and the applications of Land O'Lakes Broadcasting Corporation (WTRJ), WPTW Radio, Inc. and Advanced Allied Communications Technologies, Inc. ARE DENIED.[11]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[11] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d). l

Application, Amendment of, Engineering Change
Discovery
Nondisclosure
Ownership and Management, Integration of
Remand

Review Board remands proceeding and adds a misrepresentation/candor issue to determine the effect on an applicant's basic and comparative qualifications of its failure to disclose an employment agreement potentially inconsistent with its integration proposal in response to a discovery request. ALJ also asked to review the refusal to accept an engineering amendment in view of the fact additional hearings will be necessary in any case.

Lee Optical & Assn. Co.
MM Docket No. 83-1338

FCC 86R-11

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT AND PENSION FUND TRUST Honolulu, Hawaii	MM DOCKET NO. 83-1338 File No. BPH-821214AC
C.E. INC. Honolulu, Hawaii	MM DOCKET NO. 84-1339 File No. BPH-830420AF
PHILLIP R. ANTOINE AND LAN THI VUONG-ANTOINE Honolulu, Hawaii	MM DOCKET NO. 84-1340 File No. BPH-830420AH
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1986; Released: March 12, 1986.

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Lee Optical and Associated Companies Retirement and Trust Fund (Lee Optical), C.E., Inc. (C.E.), and Phillip R. Antoine and Lan Thi Vuong-Antoine (Antoine) for authority to construct a new FM broadcast station to operate on Channel 262C (100.3 MHz) at Honolulu, Hawaii. By an *Initial Decision* (''*I.D.*''), FCC 85D-54, released August 16, 1985, Administrative Law Judge (ALJ) James F. Tierney granted Antoine's application. The ALJ found that C.E. lacked the basic qualifications to be a Commission licensee because it lacked a viable transmitter site proposal. *I.D.*, paras. 45, 68. Under the standard comparative issue, the ALJ found that Antoine was entitled to a substantial diversification preference over Lee Optical and a moderate preference over C.E. *I.D.*, para. 58. In addition, the ALJ credited Antoine's claim that it was entitled to 100% integration credit, and he in consequence awarded it a substantial preference over both Lee Optical and C.E. Lee Optical claimed no integration credit. C.E. claimed 100% integration credit, but the ALJ awarded it ''at most 51%'' because C.E. had granted an unconditional option to Delta Radio, Inc. to acquire 49% of is outstanding stock. *I.D.*, paras. 63-65.

2. The proceeding is now before the Review Board on exceptions filed on October 7, 1985, by Lee Optical and C.E. A reply was filed by Antoine on October 22, 1985. Also pending is a Motion to Reopen and Remand for Further Proceedings filed by C.E. on November 19, 1985. In its pleadings, C.E. requests that an issue be added to this proceeding to determine if Antoine violated Section 1.65 of the Commission's rules, 47 CFR § 1.65, by failing to inform the Commission of a change in ownership of a company with which Mr. Antoine has an employment agreement. C.E. also asks that issues be added to determine the underlying facts regarding Mr. Antoine's employment agreement and the impact of Antoine's failure to disclose it on Antoine's basic and comparative qualifications. Oral argument was held on December 13, 1985. For the reasons set forth below, we shall remand this case for inquiry into the effect that the employment agreement and the failure to report have on Antoine's qualifications and specifically to determine if Antoine engaged in misrepresentation

and/or was lacking in candor in connection with the agreement.

3. Antoine is a general partnership consisting of two partners, Phillip R. Antoine, who holds 51%, and Lan Thi Vuong-Antoine, his wife, who holds 49%. *I.D.*, para. 31. Both of the Antoines claim that they will devote at least forty hours a week to running their proposed station. *I.D.*, paras. 32, 37. Mr. Antoine is the founder of Century Center Communications Corporation (CCCC), and he has served as a director and as its president and chief engineer. *I.D.*, para. 32. Among other things, CCCC is engaged in the resale of television and stereo equipment, studio and location video production, and master antenna television system construction and operation. *I.D.*, para. 33. Mr. Antoine currently devotes a significant amount of his time to the affairs of CCCC and a subsidiary. *I.D.*, para. 34. The ALJ accepted Mr. Antoine's representation that if Antoine is successful in obtaining the construction permit, he will cut back on the time he devotes to CCCC so as to accommodate his commitment to manage the proposed station on a fulltime basis. *I.D.* The ALJ also accepted Antoine's statement that a majority of CCCC's issued and outstanding stock is owned by a trust for the benefit of Mr. Antoine's daughters and of which he is the sole trustee. *I.D.*, para. 32. It is Mr. Antoine's relationship with CCCC that is the source of the problem.

4. During the discovery phase of this proceeding, C.E. served a series of interrogatories on Antoine.[1] Among the questions posed were the following.

> Question 12: For each integrated principal, state whether he or she has an employment agreement, partnership agreement, or contract of any nature by which the principal holds a commitment to the business or entity. Describe the terms and conditions of any such agreement, contract, etc. referred to.
>
> Question 14: For each integrated principal, state whether the principal intends to engage in any other employment, consulting, trade or business . . . if Antoine receives the requested construction permit. If so, state the nature of such activity and the amount of the principal's time it will require on a weekly basis.

In reply to Question 12 Antoine stated that neither of its principals had such an agreement. In reply to Question 14 it stated that neither of its principals intended to engage in any employment, consulting, trade, or business except that Mr. Antoine would continue as president of CCCC. Antoine also stated as indicated above, that he would reduce his involvement with that company to permit him to work at least forty hours a week at the proposed station.[2] However, during subsequent hearing cross-examination, Mr. Antoine revealed that he had a "proposed" employment agreement with CCCC reached during negotiations to dispose of all or part of his share in CCCC. Tr. 162-63, 216-18. After the hearing sessions were over and the record closed, Antoine produced (at the ALJ's behest — Tr. 218) various documents relating to those negotiations for the other parties. The ALJ reopened the record to receive these documents (C.E. Exhs. 9-20) and immediately reclosed it.[3] C.E. thereupon filed with the ALJ a petition to reopen the record, asking for an issue on the effect of the existence of this agreement and the failure to disclose it on Antoine's basic and comparative qualifications.[4] By *Memorandum Opinion and Order*, FCC 84M-2991, released July 5, 1984, the ALJ denied C.E.'s request. In its exceptions before the Board, C.E. challenged both the ALJ's awarding full integration credit to Antoine (arguing that the existence of the CCCC employment contract undercuts Mr. Antoine's claim that he would be integrated fulltime as general manager of the station), and the ALJ's refusal to add an issue to inquire into the effect on Antoine's qualifications of its failure to disclose the existence of the agreement. C.E.'s November 19, 1985, Motion to Reopen and Remand for Further Proceedings is essentially a rehash of and expansion on its arguments in its exceptions. The motion contains a pleading in a civil suit in an Hawaiian state court, involving Mr. Antoine and two of the other parties to the CCCC negotiations, which C.E. claims supports it position.

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[1] "Initial Interrogatories," filed March 15, 1984.

5. Included in the information introduced in evidence is a Memorandum of Understanding between Mr. Antoine, L. Robert Allen (the individual now owning the other 49% of CCCC), and Charles J. Pankow, Jr., and George E. Hutton (two individuals who are not now shareholders) (C.E. Exh. 12, pp. 2-5). The Memorandum specifies an arrangement whereby each of the four would have a twenty-five per cent interest in CCCC, and describes various provisions applicable to the reformed CCCC and its shareholders. It is dated May 19, 1982, and is signed by Mr. Antoine, among others. It provides that Mr. Antoine shall serve

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[2] "Answers and Objections of Phillip R. Antoine and Lan Thi Vuong-Antoine to Interrogatories of C.E., Inc.," filed April 9, 1984. This document is in the record as C.E. Exh. 7.

[3] *Order*, FCC 84M-2792, released June 20, 1984.

[4] Petition to Enlarge Issues and Reopen the Record, filed June 6, 1984.

as president of CCCC for a term of seven and a half years at a salary of $52,000 a year, to be adjusted for cost of living increases. There is also an employment agreement between Mr. Antoine and CCCC (C.E. Exh. 12, pp. 6-9), dated May 19, 1982. It provides that Mr. Antoine shall devote "his full and exclusive time and attention" to the discharge of his duties as president and chief executive officer of CCCC. This agreement is executed by Mr. Antoine on behalf of himself and George Hutton, one of the new stockholders, on behalf of CCCC. Another document, C.E. Exh. 20, p. 2, indicates that the two new (or proposed) shareholders have advanced more than $1,000,000 to CCCC. In sum, there is ample material in the record which appears to be squarely inconsistent with Mr. Antoine's proposal to be integrated full-time in the management of the proposed station. Antoine argues that the employment agreement is not effective since it was signed on behalf of CCCC by Hutton and there is no indication that he had authority to bind CCCC, and that in any event the employment contract was only a proposal and the parties did not mean for the agreement to be effective. Reply Br. at 10-11, 31. Lawyers' arguments are not evidence, however. In the face of written documentary evidence in the record which includes a signed agreement for Mr. Antoine's "exclusive" services and which does not on its face suggest that it is merely intended as a proposal, we believe a substantial question is raised as to the reliability of Mr. Antoine's full-time commitment to the proposed station. The present state of the record therefore does not permit a determination of whether Mr. Antoine's integration proposal either should or should not be credited. In view of the comparative significance attached to Antoine's integration standing by the ALJ, this matter is of decisional importance.

6. Antoine's failure to disclose the arrangement with CCCC also raises the possibility that Antoine may have lacked candor or made misrepresentations in its dealings with the Commission. The possible motive for an application proposing to be integrated full-time into a station's operation to conceal an arrangement obligating him to be employed full-time elsewhere is obvious. We are especially concerned with Antoine's failure to make the existence of the CCCC arrangement known during discovery. The fundamental concept underlying the discovery process is that prior to trial every party is entitled to the disclosure of all relevant information in the possession of any person unless the information is privileged. Discovery is intended to prevent just the sort of surprise during the hearing that occurred here. *See* C.

Wright, *Handbook of the Law of Federal Courts* 354 (2d ed. 1970); *Discovery Procedures*, 11 FCC 2d 185, 186 (1968). The existence of the CCCC agreement did not become known until Mr. Antoine was on the witness stand in spite of a discovery request that was plainly adequate to require its earlier disclosure. As indicated in para. 5, *supra*, we do not find Antoine's reasons for failing to disclose the CCCC arrangement in response to C.E.'s interrogatories persuasive. The submission of a misleading or untruthful response to a discovery request is fully as serious as an untruthful response made directly to the Commission. *See WNST Radio*, 70 FCC 2d 1036, 1043 (Rev. Bd. 1978), *see also Publix Television Corp.*, 36 FCC 1215, 1219 (1964). The Commission has recently emphasized tht an applicant's truthfulness in its dealings with the Commission is a matter of prime concern. *See Character Qualifications in Broadcast Licensing*, 59 RR 2d 801, 809, 822 (1986). We will consequently remand to determine whether Antoine made misrepresentations or lacked candor with regard to its failure to disclose fully Mr. Antoine's arrangements with regard to CCCC, and, if so, to determine what the effect on Antoine's qualifications may be.

7. The ALJ also found that C.E. was not qualified to be a Commission licensee because it had no viable transmitter site. *I.D.* para. 45. Briefly stated, C.E.'s unqualified status is a consequence of the ALJ's refusal to accept an amendment tendered by C.E. which sought to specify a new antenna site, its third. C.E. abandoned its first site as a result of difficulties encountered with the Federal Aviation Administration and its second because of interference problems with the FCC's monitoring station at Waipahu, Hawaii. The ALJ refused to accept C.E.'s final site amendment in substantial part because he agreed with the Mass Media Bureau that acceptance of the amendment would require the designation of additional engineering issues. *See Memorandum Opinion and Order*, FCC 84M-3973, released September 18, 1984, at paras. 2, 7, 8. While our preliminary judgment is to agree with the ALJ's resolution of this matter, since we are remanding the case for further proceedings in any event, we do not think that it would be appropriate to preclude C.E.'s amendment, and in effect disqualify it, merely because to accept the amendment would result in additional issues and further hearing. Therefore, we direct the ALJ to reconsider C.E.'s proposed site amendment. If he determines that C.E. has otherwise demonstrated good cause for accepting its amendment, he may designate and try such issues as may be necessary at the

same time as he tries the issues involving Antoine. In so ruling, we do not retreat from our strict standard in passing upon site amendments, *see, e.g., Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 and 95 FCC 2d 444 (Rev. Bd. 1983), *rev. denied*, FCC 84-119 (Comm'n 1984), but only hold that the remand posture of this case mitigates the usual disruptiveness to the hearing posed by such amendments. *Cf. Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360, 1367 (Rev. Bd. 1983), and *Guy S. Erway*, 90 FCC 2d 950 (Rev. Bd. 1980).

8. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Administrative Law Judge for further hearing in accordance with this opinion and for the preparation of such Supplemental Initial Decision as may be warranted by a supplemental record; and

9. IT IS FURTHER ORDERED, That the Motion to Reopen and Remand for Further Proceedings, filed on November 19, 1985, by C.E., Inc. IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

10. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend, filed by C.E., Inc. on August 22, 1985, September 4, 1985, September 17, 1985, November 4, 1985, and December 5, 1985, ARE GRANTED, and the amendments tendered therewith ARE ACCEPTED; and

11. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Lee Optical and Associated Companies Retirement and Pension Fund Trust on August 26, 1985, September 16, 1985, and October 3, 1985, ARE GRANTED, and the amendments tendered therewith ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 85D-54

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

LEE OPTICAL AND ASSOCIATED COMPANIES RETIREMENT AND PENSION FUND TRUST Honolulu, Hawaii	MM Docket No. 83-1338 File No. BPH-821214AC
C.E., INC. Honolulu, Hawaii	MM Docket No. 83-1339 File No. BPH-830420AF
PHILLIP R. ANTOINE AND LAN THI VUONG-ANTOINE Honolulu, Hawaii	MM Docket No. 83-1340 File No. BPH-830420AH

For construction Permit for a New FM Station

Appearances

Howard M. Liberman, Esq. (Arter & Hadden) on behalf of Lee Optical and Associated Companies Retirement and Pension Fund Trust; John D. Pellegrin and Jeffrey L. Sheldon, Esqs. (Pellegrin & Levine, Chartered) on behalf of Phillip R. and Lan Thi Vuong-Antoine; Arthur Scheiner and Barry A. Friedman, Esqs. (Wilner and Scheiner); and Arthur Steinberg, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF DEPTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: August 12, 1985; Released: August 16, 1985

Preliminary Statement

1. The captioned mutually-exclusive applications for construc-

tion permit for a new FM station to operate on Channel 262C (100.3 MHz) at Honolulu, Hawaii, were designated for hearing December 22, 1983, upon the following issues:

> a. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: CEI
>
> b. If a final environment impact statement is issued with respect to CEI which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment,
>
> (1) to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1309-1319 of the Commission's Rules; and
>
> (2) whether, in light of the evidence adduced pursuant to (b) above, the applicant is qualified to construct and operate as proposed.
>
> c. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> d. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

The *Hearing Designation Order* also noted that because of the significant difference in the size of the areas and populations which would receive FM service from the proposals, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, would be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants. The Antoines' application was also granted a waiver of Section 73.315 of the Commission's rules for city coverage.

2. A prehearing conference was held on February 27, 1984. The hearing was held on May 15, and 16, 1984.

3. By *Memorandum Opinion and Order*, FCC 84M-4154, released September 27, 1984, the following issue was added:

> To determine in regard to Lee Optical and Antoine, whether their proposed transmitter sites constitute a hazard to air navigation.

Preheaing conferences on the issue were held on October 15, 1984, and March 26, 1985. This issue was subsequently deleted by *Memorandum Opinion and Order*, FCC 85M-2271, released May 29, 1985.

4. By *Memorandum Opinion and Order*, FCC 85M-1315, released March 28, 1985, the following issue was added:

> To determine whether Antoine has violated Rule 1.65 by failure timely to report, the existence of a new media interest, and, if so, whether the evidence adduced thereunder affects the comparative qualifications of Antoine to to be a licensee of this agency.

This issue was resolved in Antoine's favor by grant of summary decision. *Memorandum Opinion and Order*, FCC 85M-2271, released May 29, 1985.

5. On June 14, 1985, Antoine filed a Petition for Leave to Amend to report that a Determination of No Hazard to Air Navigation had been received for its tower proposal, and pointed out that no condition would be necessary on any authorization granted to Antoine. That Petition, for the reasons given, may be AND IS HEREBY GRANTED and the Amedment tendered therewith IS ACCEPTED, thus, the condition imposed in *Memorandum Opinion and Order*, FCC 85M-2271, released May 29. 1985 affecting Antoine, IS DELETED.

6. Proposed Findings of Fact and Reply Findings were filed by the parties applicant on June 28, 1985 and July 8, 1985, respectively.

7. While this proceeding has experiencned greatly protracted interlocutory and related events and matters, as late as June 11, 1985, the parties reported "the possibility of settlement" for which object a further extension of time was granted in *Order*, FCC 85M-2420, released June 11, 1985. As of this moment, nothing respecting that object has been reported save the filings of the parties now under review for disposition.

8. For the reasons set forth hereinafter, this, as an Initial Decision SHALL GRANT the application of Phillip R. Antoine and Lan Thi Vuong-Antoine; that being so, the applications of C.E., Inc. and Lee Optical And Associated Companies Retirement and Pension Fund Trust MUST BE DENIED.

Findings of Fact

Lee Optical andAssociated Companies Retirement and Pension Fund Trust

9. Lee Optical and Associated Companies Retirement and Pension Fund Trust (Lee Optical) is a trust organized to provide retirement and pension benefits for the employees of Lee Optical and its related companies. There are approximately 85 beneficia-

ries of the retirement and pension fund plan (Lee Optical Ex. 1).

10. Roy A. Herberger, Jr., Dean of the School of Business of Southern Methodist University, is the sole trustee of Lee Optical. Herberger manages the trusts' assets for the benefit of the plan's participants and is subject to generally recognized fiduciary standards and to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1103 *et seq*. The plan participants do not exercise any voting power, and can limit the trustee's discretion only if the trustee violates his fiduciary duties or the Trust Agreement. (Lee Optical Ex. 1).

11. Lee Optical proposes no integration of ownership into management of the proposed FM station (Lee Optical Ex. 1).

12. Lee Optical is the licensee of broadcast station KCCN(AM), Honolulu, Hawaii. On May 21, 1985, Lee Optical filed an application for FCC consent to the assignment of its license for KCCN(AM) to Mr. B. J. Glascock, d/b/a KCCN Broadcasting Company. The transaction includes a "Non-Compete Covenant "for which the assignee will pay Lee Optical $195,840.[1] By an *Initial Decision*, FCC 85D-40, released June 17, 1985, Lee Optical's application for construction permit for a new FM station on Channel 278C at Peoria, Arizona (File No. BPH-820624AT) was granted.[2]

C.E., Inc.

13. C.E., Inc. (C.E.) is a corporation formed under the laws of the State of Hawaii on February 3, 1983. The corporation has one shareholder, Mr. Edward Y.N. Kim. Mr. Kim owns all of the issued and outstanding shares of the applicant (C.E. Ex. 1, p. 1).

14. The officers and directors of C.E. are:

Name	*Title*	*Director*
Edward Y. N. Kim	President	Yes
Carol Y. Kim	Vice-President	Yes
Claire L. Yamauchi	Secretary and Treasurer	No

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[1] Although in this proceeding Lee Optical neither reported its entering of the sales agreement nor the filing of the assignment application, as required by section 1.65 of the Commission's Rules, official notice is taken of this information contained in the Commission's files. (See FCC File No. BAL-850521EE).

[2] Official notice is also taken of this grant. Yet, as an Initial Decision, it is subject to customary exceptions and appeallate consideration under Rule 1.276 (47 CFR 1.276). By Petition Leave to Amend filed, July 31, 1985, Lee Optical reports the sales agreement and proposed assignment of its license. The Petition being unopposed and otherwise proper, IS GRANTED and the amendment tendered therewith ACCEPTED.

15. Mr. Kim is of Asian-American ancestry. He currently resides at 2156 Lanihuli Drive in Honolulu, Hawaii. His residence is within the predicted 70 dBu contour of the proposed radio station (C.E. Ex. 1, p. 1).

16. On April 13, 1983, C.E. entered into a Stock Option Agreement with Delta Radio, Inc. (a Kansas corporation). The Stock Option Agreement provides that Delta Radio, Inc. may purchase up to 49 percent of C.E.'s issued and outstanding capital stock. The purchase price for each option share shall be based on the ratio the shares being acquired have to the total issued and outstanding stock of C.E., multiplied by C.E.'s legitimate and prudent expenses, to the date of acquisition, in connection with the prosecution of C.E's FM construction permit application. C.E.'s "legitimate and prudent expenses" used in calculating the share prices are to be those permitted under Section 73.3525 of the Commission's Rules and cases decided thereunder (C.E. Ex. 1, Attachment A, p. 2). As part of the option price, Delta would not be required to pay any part of station construction costs (Tr. 65). The Stock Option Agreement carries no express expiration date, and is restricted only by the limitation that Delta may acquire only up to 49 percent of C.E.'s issued and outstanding stock (C.E. Ex. 1, Attachment A, p. 3). The option, to the extent not exercised, shall terminate if C.E. is unsuccessful in securing a license to construct and operate a commercial FM radio station in Honolulu, Hawaii (C.E. Ex. 1, Attachment A, p. 4). There are no conditions precedent to Delta's right to acquire up to 49 percent of C.E.'s stock.

17. By its own terms, the Stock Option Agreement was entered because C.E. is "desirous of obtaining the professional skills and financial assistance of [Delta] and [Delta's] shareholders," and Delta and its shareholders "are interested in participating in [C.E.] plans for a new radio station" (C.E. Ex. 1, Attachment A, p. 1).

18. Kim stated that C.E. had located an alternate transmitter site (the Gentry-Waipio site) about 3 or 4 *months* prior to the hearing, however the C.E. engineer, Mortan, stated that the site was not located until 5 to 7 days before the amendment was filed; i.e., about 3 *weeks* before the hearing (Tr. 142, 153, 155).

19. Kim explained that he gave Delta an option in C.E. so that if C.E. were successful in securing the FM construction permit, Delta could decide for itself whether to participate in the station (Tr. 62). Kim did not feel obligated to give Delta an option, but decided to give one if Delta and/or Delta's principals were willing

to participate in the cost and expense of building the station (Tr. 63). Kim acknowledged, however, that the option agreement did not obligate Delta to pay station construction costs as part of the option price (Tr. 65). As Kim expressed it "[y]ou certainly don't expect people to give you assistance which might cause [sic] a lot of money and a lot of time for nothing" (Tr. 61).

20. Although testifying that Delta did not assist in preparing C.E.'s FM application (Tr. 97), Kim expressed his opinion that without Delta's assistance, chances were more likely than not that he would not have attended the hearing (Tr. 98). Kim had very little contact with Delta. He does not know who the stockholders of Delta are, believing it is none of his business what goes on within that company (Tr. 96). As far as he was concerned, a "Mr. Molasky was the only principal of Delta" (Tr. 95). Kim never met Molasky, and has had "hardly any, if any" conversations with Molasky (Tr. 62).

21. Although Kim did not check any of the stations Delta was involved in or even know of any stations Delta was involved in, he depended on the good faith of the people with whom he was dealing (Tr. 83–84).

22. Although the option agreement limits the transferability of the option to Delta's shareholders as of the date of the option agreement, Kim has no record of who the stockholders of Delta were at that time nor whether any of those stockholders have changed (Tr. 96). The stock option agreement further limits the transferability of C.E.'s stock acquired under the option by the terms of a "Buy and Sell" agreement attached to the option agreement (C.E. Ex. 1, Attachment A, p. 5). That rider generally grants a right of first refusal to C.E.'s shares first to the corporation itself and then to its remaining shareholders in proportion to their stock interests (C.E. Ex. 1, Attachment A, Ex. A). If Delta exercises the stock option, Kim's shares of C.E. stock would also be subject on this limitation on transferability (Tr. 103). Kim has not considered buying back the option he granted to Delta (Tr. 106).

23. C.E. proposes to employ Edward Y. N. Kim as the station's General Manager, spending a minimum of 40 hours per week at the station in such a capacity (C.E. Ex. 3). Kim, an Asian-American, is a life-long resident of Honolulu, Hawaii. He earned his undergraduate degree from the University of Iowa in Iowa City, Iowa. Kim was admitted tothe Bar of Hawaii in 1951 and currently is a partner in the law firm of Kim & Kim in Honolulu,

Hawaii. Kim has no experience in broadcasting (C.E. Ex. 4, p. 1). Although Kim had been an active participant in various Korean-American organizations, his involvement in such community organizations has diminished in recent years. Prior to 1972, Kim was active in organizations such as Kook Min Huk, a Korean benevolent association, the Korean Community Council, group organization to serve the Korean-American community's social needs, the Korean University Club, and Kook Min Bo, a weekly newspaper printed in Korean and circulated throughout Honolulu's Korean-American community. The only recent activities in which Kim has been engaged are the Hawaii Bar Association, the Korean-American Citizens League, and Koa Anuenu, a support group for the athletic programs of the University of Hawaii. Kimh as also been a community member of the Honolulu symphony (C.E. Ex. 4, p. 2).

24. Kim has a been civil trial attorney for 33 years (Tr. 71, 73). His practice includes cases on contracts, tax, and torts, including complex litigation. Besides himself, his law firm has only one other attorney, his son, who has been with the firm about eight years (Tr. 71, 74). Kim cannot define the amount of time he spends in his law practice, but indicates there is "constant preoccupation and constant involvement" (Tr. 75). As of the hearing date, Kim anticipated handling 6 or 7 jury trials before the end of the year including one which could be characterized as complex (Tr. 77). Kim estimates he keeps a running docket of about 50 cases a year (Tr. 79). Although stating he is "winding down" his law practice, Kim could not state definitely whether he would or would not become involved in any protracted litigation (Tr. 76). Neither would Kim indicate whether he would retire from the firm, since "there's no such thing as a clear-cut thing." Kim imagines he would have some involvement with the law firm "sooner or later" (Tr. 80–81).

25. Neither C.E. nor Edward Y. N. Kim directly has any interest in other mass media outlets (C.E. Ex. 2, p. 1). Principals of Delta Radio, Inc., which hold an unconditional option to acquire up to 49 percent of C.E.'s stock, do have interests in other mass media outlets. Delta has filed applications with the FCC for new AM radio stations at Austin, Texas and Madison, Wisconsin. Delta holds a 51 percent interest in an applicant for a new FM radio station at Cheny, Washington, and has entered a stock option agreement to acquire an interest in an applicant for a new FM radio station at Evergreen, Colorado (C.E. Ex. 2, p. 1). Principals of Delta have existing interests in media of mass

communications. Messrs. Mervyn L. Adelson and Irwin A. Molasky own a 48 percent interest in Delta. They are, respectively, the President and Treasurer of La Costa Community Antenna System, Inc., which owns and operates Rancho La Costa Cable TV, providing cable television service to portions of Carlsbad, California. As of January 31, 1984, the system had 4,044 subscribers plus one hotel with 297 primary connnections. Carlsbad is approximately 2,614 miles from Honolulu, Hawaii (C.E. Ex. 2, pp. 1-2).

26. Adelson and Molasky are officers and shareholders of Lorimar productions, Inc., a national producer and syndicator of television broadcast programming.[3] According to the most recently-filed Annual Report (Form 10-K) on Lorimar, Inc. as filed with the Securities and Exchange Commission, Lorimar and its subsidiaries are engaged in the development, acquisition, production and distribution of television series, made-for-television movies and mini-series produced for network and/or pay television and of feature films.[4] Lorimar has produced programming which has appeared and which is scheduled to appear on each of the three major television broadcast networks (ABC, CBS, NBC) (Attachment B, p. 2-3). Lorimar is also involved in the production of feature films for theatrical distribution throughout the United States and Canada. (Attachment B, p. 4). Most of Lorimar's films also have been licensed for distribution through the home video market (Attachment B, p. 5).

27. C.E. learned through publicly available documents that Lorimar had acquired Kenyon & Eckhardt Advertising, Inc., a national advertising agency (Tr. 114-115, by stipulation). According to Lorimar's SEC filings, Kenyon & Eckhardt is one of the largest advertising agencies in terms of worldwide billings, with offices in over 55 countries. Most recently, it was reported in the trade press that Lorimar had acquired yet another advertising company, Bozell & Jocobs.[5]

28. C.E. and its President, Edward Kim, learned sometime prior to the hearing that John Rook also had an option to acquire stock in Delta, which in turn has an option to acquire stock in C.E. (Tr

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[3] Attached to Antoine's proposed findings is a portion of an Amendment to SEC Form 10-K, filed by Lorimar, Inc. on March 14, 1985 with the Securities and Exchange Commission (SEC). (Official notice is taken of this information.)

[4] Official notice is also taken of SEC Filing 10-K for fiscal year including July 28, 1984 by Lorimar, Inc. and listed as Attachment B to Antoine's proposed findings.

[5] *Broadcasting,* June 17, 1985, at 96. Official notice is taken of this trade press report set out as Attachment C to Antoine's proposed findings.

86). By stipulation, it was reported that Rook is a principal of the parent of the licensee of KEYG (AM) and KEYF (FM), Grant Coulee, Washington, Rook is also a principal of the parent of the licensee of KCDA-FM, Coeur d'Alene, Idaho, and he is a principal of KQLT-FM, Casper, Wyoming (Tr. 91-92).

29. C.E. proposes to acquire, install and operate auxiliary power equipment at its proposed FM station (C.E. Ex. 5).

30. With respect to the air hazard and environmental issues designated against C.E., C.E. proffered two amendments to change transmitter sites in an effort to remove these issues. Both amendments were rejected. *See Memorandum Opinion and Order*, FCC 84M-2741, released June 18, 1984., and *Memorandum Opinion and Order*, FCC 84M-3973, released September 18, 1984. Therefore, C.E.'s original site proposal, for the Honolulu Towers building, remains pending before the forum, including the air hazard and environmental issues attendant to that site proposal. In any event, C.E. has abandoned its intentions to propose use of the Honolulu Towers site (Tr. 121).[6]

Phillip R. Antoine and Lan Thi Vuong-Antoine

31. Phillip R. Antoine and Lan Thi Vuong-Antoine, husband and wife, hold 51 percent and 49 percent general partnership interests, respectively, in their application for construction permit for a new FM station at Honolulu, Hawaii (Antoine Ex. 1, p. 1, Antoine Ex. 2, p. 1). Mr. and Mrs. Antoine have been married since 1979. Their residence is within the 3.16 mV/m contour of the proposed radio station (Antoine Ex. 1, p. 1).

32. Phillip R. Antoine will devote at least 40 hours per week to the proposed station's day-to-day operations as its General Manager, responsible for overall station operations (Antoine Ex. 1, p. 3). Mr. Antoine was born in 1933, and attended West Los Angeles University High School, in Los Angeles, California. Throughout his business career, Antoine has attended many training seminars on communications-related topics (Antoine Ex. 1, p. 1). From 1958 until 1967, he owned and operated Pacific Master Systems, which was engaged in the construction and operation of cable television systems in Newhall, Saugus and Simi Valley, California. After selling 80 percent of Pacific Master

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[6] By Petition for Leave to File "Information Statement," filed, June 19, 1985, C.E. reports "determination by the Federal Aviation Administration that applicants proposed antenna site is not a hazard to air navigation." The Petition is unopposed and for purposes of Rule 1.65 IS GRANTED and the "Information Statement" ACCEPTED.

Systems in 1967, Antoine sold the remaining 20 percent in 1969, and acquired a fifty percent interest in Boron Cablevision, in Kern County, California. In 1976, he sold his interest in Boron Cablevision, moved to Honolulu, and established Century Center Communications Corp. (CCCC), serving as Director, President and Chief Engineer. A majority of the issued and outstanding stock of CCCC is held by Circle of Friends Trust, of which Antoine is sole trustee, for the benefit of his daughters (Antoine Ex. 1, p. 2, Tr. 159).

33. CCCC is engaged in the resale of television and stereo equipment, studio and location video production, master antenna television system construction and operation, and the photographic arts (Antoine Ex. 1, p. 2). CCCC was formed primarily to serve apartment and condominium projects developed by its Chairman (Tr. 176-177). CCCC presently provides four video channels, selected by the customers, to four condominium buildings. (Tr. 168). The contracts for service run between CCCC and the condominium boards of directors, with the boards paying CCCC monthly for the bulk service (Tr. 168). About 800 condominium residents ultimately receive the services delivered by CCCC (Tr. 167). Discussions have occurred over the last year or two concerning a proposed reorganization of CCCC's ownership structure and/or liquidation of the company. (Tr. 163-167, 175-177, 217-218; C.E. Exs. 9-20). CCCC holds 100% of the issued and outstanding stock of Hawaiian Microwave Corporation, which has been established as a communications common carrier, but has not yet commenced revenue service, and has no immediate plans to commence revenue service (Antoine Ex. 1, p. 2; Tr. 179).

34. If successful in securing the FM construction permit, Antoine will reduce the amount of the time devoted to CCCC and Hawaiian Microwave Corporation to accommodate his commitment to manage the FM radio station on a full-time basis (Antoine Ex. 1, p. 2). Antoine has trained a full-time administrative assistant who has relieved Antoine of about half of his duties with CCCC, such as dispatching, hiring, firing, and doing the payroll. Even if Antoine continues as President of CCCC, about 80 percent of Antoine's duties could be handled by a good general manager, such as the administrative assistant currently working for CCCC (Tr. 181).

35. Antoine is technically oriented, with some 30 years business experience in communications (Tr. 229). Antoine sometimes acts as a communications consultant on an occasional basis (Tr.

130–231). In conjunction with CCCC, Antoine designs video systems, sound systems and master antenna television systems (Tr. 160).

36. Antoine is the Treasurer and a Director of the Century Center Condominium Association, which is the association of business and residential apartment owners of the Century Center complex. He is also Chairman of the Association's budget Committee and Chairman of the Association's Restaurant Committee (Antoine Ex. 1, p. 3).

37. Lan Thi Vuong-Antoine, holding a 49 percent general partnership interest in the application, will devote at least 40 hours per week to the station's day-to-day operations as its Program Director, responsible for program selection, field production, and supervision of on-air personalities (Antoine Ex. 2, p. 2). Mrs. Antoine was born in Southeast Asia in 1950, and came to the United States in 1969. From 1969 until 1975, she owned and operated a wedding/bridal shop in Denver, Colorado while attending school part-time. From 1975 until 1978, Mrs. Antoine was the co-owner and operator of a hotel cocktail lounge featuring live bands in Honolulu, Hawaii. Since that time, she has been engaged in real estate investment, primarily with respect to the development of single-family homes (Antoine Ex. 2, p. 1). Mrs. Antoine has resided in Honolulu since 1975.

38. Mrs. Antoine intends to be a manager at the proposed FM station in the programming department, even though her husband will have overall responsibility for the station (Tr. 267–268). As Program Director, Mrs. Antoine would have authority to hire and fire (e.g., disc jockeys and a secretary) and to select musical programming, particularly ethnic music (Tr. 267–268; 301–302). Mrs. Antoine would make her own decisions on these matters, but she would discuss them with her husband since he will be the General Manager (Tr. 279).

39. If she and her husband receive the FM construction permit, Mrs. Antoine will adjust her real estate investment activities to accommodate her commitment to work full-time in the management of the radio station (Antoine Ex. 2, p. 1). She had been working on two projects in Anchorage and Fairbanks, Alaska, which were to have been completed shortly after the hearing (Tr. 250). Other than these, Mrs. Antoine has no other projects underway or planned (Tr. 256). Because she uses a general contractor for the housing projects and lists them with a real estate company, Mrs. Antoine believes she could still invest in one or two homes per year and fulfill her commitment to work

full-time at the radio station (Tr. 255-256; 264). Mrs. Antoine also would be willing to give up her real estate investment activities (Tr. 291), since she has other savings and investments to cover any lost income from real estate (Tr. 282).

40. Mrs. Antoine proposes to keep flexible hours at the station so that she will be able to care for her three daughters (Tr. 296). She is prepared to spend a least 8 hours per day, 5 days a week, every week at the station. (Tr. 262). Her children will be in school most of the day, and since their apartment is in the same building as the proposed radio station, Mrs. Antoine is only an elevator-ride away from meeting them after school (Tr. 295). Mrs. Antoine also has a housekeeper to help with the children (Tr. 295).

41. Mrs. Antoine is of Asian descent and heritage, and is a naturalized United States citizen (Antoine Ex. 2, p. 2).

42. Other than their interests in the present application construction permit for a new FM station at Honolulu, neither Mr. nor Mrs. Antoine has any interest in or connection with any other media of mass communications (Antoine Ex. 1, p. 2-3; Antoine Ex. 2, p. 2).

43. The Antoines propose to install auxiliary power equipment at their station (Tr. 158-159).

Ultimate Findings and Conclusions

44. Before treating the evidence under the customary comparative considerations, the long procedural journey is pursuit of the so-called "brute force" FAA engendered issue will be addressed first. Simply for reasons that that issue is determinative of basic qualifications of those parties affected. C.E. in its Proposed Findings suggests that since the forum deleted the "brute force" issue designated against Lee Optical and Antoine, it follows that the FAA issue designated against C.E. has no further relevance in this proceeding. Indeed, C.E. argues "[w]ith the Presiding Judge's deletion of the basic qualifications issue against Lee and Antoine, this matter has taken a unique procedural twist. Either all parties have to establish that they satisfy the FAA's brute force concerns or they do not. As the Presiding Judge has chosen the latter course, then it must follow that all parties that have viable sites are basically qualified" (C.E. Proposed Findings at 5).

45. As Lee Optical notes in its Reply, "C.E.'s argument is based on flawed logic." More, it is twisted and distorted reasoning. First, there is outstanding a site issue against C.E. and thus, C.E. cannot decide, *ipse dixit*, to choose not to prosecute that issue on the grounds urged. Second, the evidence is clear

beyond peradventure that C.E. has unsuccessfully attempted to locate a suitable site and as of this moment has no approved site. Indeed, as footnoted earlier, as late as June 19, 1985, C.E. filed a Petition for Leave to Amend its application reflecting that the FAA had issued a determination of no hazard in connection with the site C.E. specified in an amendment filed August 31, 1984. That amendment had been rejected, for the several reasons given, in *Memorandum Opinion and Order*, FCC 84M-3973, released September 18, 1984; and that ruling persists. Consequently, as argued by Lee Optical, the recent FAA determination in the face of that *Memorandum Opinion and Order* fails in relevance. On the other hand, in the case of Lee Optical and Antoine, the FAA issue designated by this forum against them in *Memorandum Opinion and Order*, FCC 84M-4154, released September 27, 1984 has, for the reasons given, been deleted in *Memorandum Opinion and Order*, FCC 85M-2271, released May 29, 985; (para. 10, p. 3). C.E.'s status respecting its transmitter site was not comprehended in that disposition. Thus, absent a viable transmitter site C.E. is not qualified to be a Commission licensee. *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983); (court appeal docketed and pending No. 84-1168 (D.C. Cir. May 2, 1984).

46. Another matter not strictly concerned with comparative considerations; Antoine's argument that Lee Optical is not "legally qualified" to operate its proposed FM station because of a "Non-Compete Covenant" in connection with the assignment of the license of station KCCN(AM), Honolulu, Hawaii, the community of proposed license here. Lee Optical, apparently conceding the existence of the Covenant, first argues that there is "no legal qualification or similar issue" at bar; that the "Non-Compete Covenant" will not be "*executed*" unless the assignment is approved by the Commission; and that that Covenant will simply be an agreement between Lee Optical and the prospective assignee and whether that Covenant applies to AM broadcasting only or to FM broadcasting also should Lee Optical's application here be granted "is totally irrelevant" here. Really? Has not Lee Optical by its own formal act forcast its promise not to compete in broadcasting there in Honolulu? Unless there is a clear and unequivocal representation by Lee Optical that the "Non-Compete Covenant," albeit yet unapproved by formal Commission act, excludes its present objects in this proceeding, what else can be concluded should that proposed assignment ripen into reality? Again, unless the full reach and impact of its "Non-Compete Covenant" are disclosed, a matter totally undisclosed at this

juncture, Lee Optical by its own deed becomes the victim of its own undoing. *Vox emissa volat; litera scripta manet* (the spoken word flies; the written letter remains). Therefore, Antoine's thesis has much going for it, and as Antoine adds, Lee Optical's "present application for a construction permit is inconsistent with its application for consent to assignment of license, which includes a covenant not to compete." Even if Lee Optical's application is not denied on these grounds, Antoine footnotes, Lee Optical deserves at least a comparative demerit for its failure under Section 1.65 to report the station sale agreement and the filing of the assignment license application. That is a persuasive position and a slight demerit will be assessed, albeit a belated Lee Optical Petition reflecting these matters has been earlier granted. Antoine would forego requesting an added issue at this late date "due to the fact that this matter arose just prior to the filing of Proposed Findings . . . "

47. In its Reply, Lee Optical belatedly footnotes that amendment reporting the grant of its application for an FM station at Peoria, Arizona in an Initial Decision "and the filing with the Commission of the application for the assignment of the license of station KCCN(AM) will be forthcoming." It would now appear that Lee Optical has been derelict in tending to its reporting responsibilities and, hopefully, the depth and of "Non-Compete Covenant" will also be forthcoming. In any event, for the moment, Lee Optical will not be, even poetically given the "*coup de grace*" of disqualification, but surely to repeat, must and will be assessed a moderate comparative demerit in failing to report these happenings timely.

Comparative Considerations

48. Because this disposition is hardly ever the last word in these premises, comparative analysis and determination will be given to all parties, should probable appellate bodies be differently disposed.

49. The foundation on which all rests, comparatively, is of course, the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), and abiding precedent derived therefrom. That *Policy Statement* describes two major objects in the determining process among contestants for broadcast licenses, the quest for and the realization of: (1) the best practicable service to the public; and (2) a maximum diffusion of the control of the mass media of communications. Subsumed under the criterion of "best practicable service" is the goal of the fullest participation or

integration of ownership and management with enhancing factors of local residence, civic participation, broadcast experience coupled with the encouragement and fostering of female and minority ownership, as a public good in themselves. Maximum diffusion, as an objective, is co-termed diversification of ownership of broadcast interests to serve that social goal of according the public the greatest feasible diversity of "voices" in a community served by broadcast licensees, so well set forth in *Associated Press* v. *United States*, 326 U.S. 1. There it was proclaimed that the First Amendment to the Constitution "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" at 20. In that context all comparative contests for broadcast franchise must, as here, be judged. "Diversification is a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme" *Policy Statement* at 397.

Diversification

50. While their opponents disagree for reasons otherwise unpersuasive, Phillip R. Antoine and Lan Thi Vuong-Antoine hold no cognizable interests in other media of mass communications. Mr. Antoine's interest in CCCC does not constitute a medium of mass communications cognizable for diversification purposes. For example, CCCC does not control the content of the programming delivered to the condominium building customers, and does not have the capability to produce programming for distribution through the systems. Indeed, CCCC's video delivery systems are too small to warrant the conclusion that a grant to the Antoines would be inconsistent with the Commission's goals of fostering a maximum diffusion of control of the media of mass communications. *Gainesville Media, Inc.*, 70 FCC 2d 58, 63-64 (Rev. Bd., 1978).

51. Lee Optical warrants a significant diversification demerit based on its ownership of KCCN(AM), licensed to the same community (Honolulu) as its proposed FM station. Ownership interests in existing stations are most significant when located in the principal community proposed to be served. *Policy Statement*, 1 FCC 2d 393, 394 (1965), *Hampshire County Broadcasting Co., Inc.* 57 RR 2d 463 (Rev. Bd. 1984), *Golden State Broadcasting Corp.*, 94 FCC 2d 212 (Rev. Bd. 1983). Although Lee Optical has entered an agreement to assign the license to KCCN(AM), Lee Optical made no pre-designation commitment to divest this station, thus, it must be counted against Lee Optical for

diversification purposes. *Broadcast Communications, Inc.*, 53 RR 2d 805, 812 (Rev. Bd. 1983), *modified on review*, 55 RR 2d 997 (Rev. Bd. 1984). Lee Optical has been granted in an Initial Decision yet to be affirmed or denied under appellate review a construction permit for a new commercial FM broadcast sation at Peoria, Arizona; it is nevertheless a cognizable interest, albeit subject to a condition subsequent.

52. C.E., Inc. and its 100 percent stockholder, Edward Kim, have no interest in other media of mass communications. However, Delta Radio, Inc., holding an option for up to 49 percent of C.E.'s stock, does have other media interests. Since the other media interests of option holders are to be counted for diversification puposes, the media interest of Delta and its principals can and will be held against the applicant, C.E. *Colorado Television, Inc.,* 56 RR 2d 1080, 1087 n. 12 (Rev. Bd. 1984), *Radio Laredo, Inc.* 87 FCC 2d 535, 362 n. 14, *rev. denied,* FCC 82-62, released February 3, 1982, *aff'd per curiam sub nom. Amigos Broadcasting, Inc.* v. *FCC,* 696 F. 2d 128 (D.C. cir. 1982).

53. Messrs. Mervyn L. Adelson and Irwin A. Molasky own 48 percent interest in Delta, and are officers of La Costa Community Antenna System, Inc., owner and operator of a cable television system serving 4,044 subscribers and one hotel (with 297 primary connections) at Carlsbad, California. Cable television systems are cognizable media of mass communications for diversification purposes. *Greater Wichita Telecasting, Inc.* 96 FCC 2d 984, 988 1984), *appeal pending.* Although cable television systems traditionally have been of lesser concern than broadcast stations from the standpoint of "media voices," cable is clearly moving away from its origins as a passive carrier and is becoming more of a media "voice" in its own right under the diversification analysis. *Santee Cooper Broadcasting Co. of Hilton Head, Inc.,* 57 RR 2d 662, 674 n. 54, *reconsid. denied,* 57 RR 2d 1363 (Rev. Bd. 1985). Thus, C.E. can be held accountable for a 23.52 percent (48% x 49%) interest in the Carlsbad, California cable television system.

54. Messrs. Mervyn L. Adelson and Irwin A. Molasky are also Chairman of the Board and Vice President, respectively, of Lorimar, Inc. which is engaged primarily in the development, acquisition, production and distribution of television series, made-for-television movies and mini-series produced for network and/or pay television and feature films. Lorimar's television programming has appeared among the regularly-scheduled programming of each of the three major television broadcast networks (ABC, CBS, NBC). Since 1977, Lorimar has released at least 22 feature

films for theatrical distribution throughout the United States and Canada. Lorimar has also entered licensing agreements by which most of Lorimar's films will be distributed in the home video market. In addition, Lorimar has acquired two national advertising firms, Bozell and Jacobs and Kenyon and Eckhardt. Lorimar's pervasive presence in the national advertising and programming marketplace and its top executives' interests in C.E.'s application "undermines the objectives underlying the principal of diversification of control of mass media; i.e., maximizing available program services and viewpoints and preventing any undue concentration of economic power contrary to the public interest." *Morris, Pierce and Pierce,* 88 FCC 2d 713, 724 (Rev. Bd. 1981), *review denied,* FCC 83-31, released January 25, 1983. In *Golden State Broadcasting Corp.,* 94 FCC 2d 212 (Rev. Bd. 1983), the Review Board noted that where the interest of a principal to an applicant is greater than *de minimis,* the Commission would be concerned with any arrangement whereby that principal would also be involved with a program production company. In the present case, 48 percent of Delta's stock is held by individuals in positions of authority over a national programming and advertising company. Delta, in turn, has the right to acquire up to 49 percent of C.E.'s stock. This, as Antoine argues, represents an appropriate case for the addition of a diversification demerit for otherwise noncognizable media interests. *Cf. J. T. Lamprecht,* 57 RR 2d 1194 (Rev. Bd. 1984) and *Pittsfield Community Television Association,* 56 RR 2d 134 (Rev. Bd. 1983) (no evidence that advertising company has or will place advertising in proposed station's broadcast service area). The ownership interests in Lorimar attributable to the applicant, C.E., raise some potential conflict of interest problems, and C.E. should and will be assessed at least a "minor related comparative demerit" because of such ownership. *See Mid-Florida Teelevision Corp.* 69 FCC 2d 607, 649-650 (Rev. Bd. 1978).

55. The John Rook "some kind of option" in Delta is too vague for full assessment; hence, his broadcast interests outside the community of license will not be taken into account under diversification.

56. In its Reply, C.E. states that "the diversification issue is of no consequence insofar as C.E.'s application is concerned." Among other arguments, C.E. submits that the evidence relied on by Antoine is extra-record regarding evidence in documents filed in other federal agencies; that a company such as Lorimar, Inc. or

its advertising agency interests are of no avail to Antoine's position in that the evidence of record does not reflect that the production company should be considered a medium of mass communications, absent evidence that such an interest would undermine the objectives of diversification; that no such evidence exists; that advertising agency interests can only be attributed where there is evidence that the agency places advertising on radio stations in the areas of community license of the proposed station, again no evidence of record; that Antoine's request for "Official Notice" is misplaced and misconceived in that the matters requested must be generally known by the trial court or capable of accurate and ready determination by resort to sources where there is no question of accuracy, citing Federal Rules of Evidence, Sec. 201(b), and that Antoine's attempts do not satisfy this standard but require evidentiary examination.

57. C.E.'s plaint concerning the parameters of "Official Notice" comes to this: "Official Notice," without doubt is akin to and a derivative of "Judiciary Notice" customarily followed in the regular Federal Judiciary; but traditionally in Administrative Jurisprudence is hardly as circumscribed as "Judicial Notice." *See Davis Administrative Law*, Chapter 5 (1951) "Official Notice"; and certainly traditionally in this agency's proceedings where officially filed documents, press and trade press articles and publications, among others, a lesser order, far less, than any species of proof or probative matter generally before the regular courts in matters of "Judicial Notice" have been given the *imprimatur* of "Official Notice." Here, not only does the forum recognize that the requested matter is generally known within its jurisdiction and long experience but more, the requesting party has supplied officially stamped and received copies of required filings with and before the Securities and Exchange Commission. Indeed, as the cited Federal Rule suggests, C.E.'s argument in refutation has been considered, thus heard, and fails entirely in persuasion. Thus, the Antoine requested "Official Notice" as to its attached documents and their contents, earlier taken, is affirmed.

58. Overall, the Antoines should and will receive a substantial diversification preference over Lee Optical, based on the fact that the Antoines have no other cognizable media interests, whereas Lee Optical has an AM radio station within the proposed FM station's community of license, *Hampshire County Broadcasting Co., Inc.*, 57 RR 2d 463 (Rev. Bd. 1984), and a construction permit for another FM station outside the proposed community of

license. Because of the interest of the principals of Delta Radio in other media enterprises, both outside the proposed community of license and on a natonal basis, Antoine would be entitled to at least a moderate preference on the issue of diversification over C.E. That moderate preference is given.

Best Practical Service to the Public

59. Lee Optical proposes no integration of ownership into management.

60. The Antoines propose 100 percent full-time integration of its ownership into the management of its proposed FM radio station. Phillip R. Antoine, the 51 percent general partner, will be employed as General Manager of the proposed FM station, spending at least 40 hours per week in such capacity. Lan Thi Vuong-Antoine, the 49 percent general partner, will be employed in a managerial capacity as the station's Program Director. Antoine's 100% full-time integration proposal is enhanced by Mr. and Mrs. Antoine's local residence within the primary service contour of the proposed FM station and Mr. Antoine's civic activities.

61. Lee Optical denigrates — the proposed activity of Lan Thi Vuong-Antoine as a little more than Mr. Antoine's desire to induce a supposed peripatetic wife to abandon her real estate and related interests in far-away Alaska and return to home and other familial duties; that Antoine's object here to acquire the proposed facilities is simply a "hobby." While Mrs. Antoine does not seem fully at home with the intracacies of the English or American language, and has little background to support her planned role as Program Director, she seems fully capable of learning that role.

62. In any event, the Antoines' proposal is further enhanced by the fact that the 49 percent general partnership interest is held by a female and a minority group member. Antoine would have it that because of Mr. Antoine's extensive involvement in cable television systems, master antenna television systems and other communications interest, Mr. Antoine's integration proposal is also qualitatively enhanced by this past "broadcast" experience. While, as Antoine suggests, there may be no policy reason why "broadcast" credit cannot be awarded to an individual, such as Mr. Antoine, with substantial communications experience, broadcast experience surely must have a clear nexus to broadcasting, a medium of mass communications which Antoine disavows respecting his past and present business activities. In any event, such

experience is of minor significance and will not be credited to Antoine.

63. C.E., Inc. has proposed to integrate its 100 percent stockholder, Edward Kim, into the station's management as its General Manager. Because C.E. has granted an unconditional option to Delta Radio, Inc. to acquire up to 49 percent of C.E.'s issued and outstanding stock, C.E. can claim integration credit for no more than 51 percent of its ownership. Since there is no evidence that the option will not be exercised, it must be construed adversely to the applicant. *See Washington Christian Television Outreach, Inc.*, 94 FCC 2d 1360, 1366 (Rev. Bd. 1983). Antoine footnotes that in that case "the Board cited *Radio Laredo, Inc.* 87 FCC 2d 353, 354, and n. 14 (Rev. Bd. 1981), *rev. denied* FCC 82-62, released February 3, 1982, *aff'd sub. nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F. 2d 128 (D.C. Cir. 1982). In *Radio Laredo*, the question of the effect of an option upon integration was never reached, since both the optionor and the optionee were proposed to be integrated into management on a full-time basis. *Cf. Radio Station KFH Co.*, 19 FCC 1119 (1955), wherein integration credit was granted to an option holder who proposed to be integrated into management. Clearly, for credit to be given to an option holder, the credit which would otherwise accrue to the optionor whould have to be correspondingly reduced." This seems more than plausible reasoning, is accepted and the integration credit to C.E. will set at 51%. There are no conditions precedent to the exercise of the option, and Delta (or its stockholders) may acquire up to 49 percent of C.E. merely by paying an amount equal to the *pro rata* portion of C.E.'s application expenses to date. Mr. Kim offered Delta the option in order to benefit from Delta's expertise in constructing and operating the proposed FM station. As Antoine observes, "common and business sense would also indicate that Delta would be likely to exercise its right to acquire 49 percent of a potentially very valuable FM radio broadcast station merely upon payment of 49 percent of application costs." *Cf. Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984 (Rev. Bd. 1983); *Webster-Baker Enterprises*, 88 FCC 2d 944, 954 (Rev. Bd. 1982). The option agreement here with Delta was reduced to writing, has been placed into evidence and continues to exist. Here, there are no conditions outside the control of Delta which would prevent it from acquiring up to 49 percent of C.E.'s stock.

64. Antoine's further speculations concerning Kim's inability to meet his commitment of full-time participations are simply that — speculations. He has affirmatively committed himself to that participation and will be held to that committment, his active law practice notwithstanding. Nothing in the evidence would undermine a reasonable assurance of the ability to fulfill his full-time proposal.

65. Under integration of ownership into management, the Antoines warrant a substantial preference over Lee Optical and C.E. because of the Antoines' proposal for 100 percent full-time integration is sustained in the evidence and is enhanced by local residence, civic involvement and female and minority participation. Lee Optical presented no integration proposal, and C.E.'s integration proposal would be at most 51%, enhanced by minority ownership of Kim as an Asian-American as well as local residence.

Comparative Coverage

66. No evidence was submitted on the relative differences in areas and populations receiving service from the applicants' proposals, thus, none of the applicants deserves a preference on this issue.

Auxiliary Power

67. Since all of the applicants have proposed auxiliary power, none deserves a preference on this issue.

68. C.E., Inc. is basically unqualified to be a Commission licensee for reasons set forth earlier hence, its application must be denied on that ground. Lee Optical's entering a covenant not to compete in connection with the sale of its AM radio station at Honolulu casts a pervasive shadow on its basic qualifications. But even in the absences of that fatal flaw were comparative consideraton to be given, it also falters slightly under diversification criteria, albeit for a recent broadcast license grant a virtual continent away from Hawaii. And, as admitted, Lee Optical does not receive any quantitative integration of ownership and management. Its one saving feature, again as admitted, "it has experience in bringing in qualified personnel for the purpose of operating a broadcast facility" at Honolulu, Hawaii while, Lee Optical says, "its opponents do not." The record here belies these ruminations and to borrow a little from Lee Optical's very misdirected conclusion as to its opponents, its position is but "a shot in the dark" in an empty room.

69. By Petition for Leave to Amend, filed June 14, 1985, Antoine reports that now the FAA had made a determination of no hazard to air navigation of the proposed Antoine transmitter site. Apparently the "brute force" thesis is no longer of moment here. Will miracles never cease. The Petition being unopposed and good cause appearing IS GRANTED and the Amendment tendered ACCEPTED; thus, any earlier condition imposed on Antoine IS DELETED. This simply affirms earlier consideration and approval, *supra*.

70. In sum, because of their superior, comparative posture to their opponents under diversificaton and the integration of ownership and management, the Antoines must prevail here.

Accordingly, for the reasons set forth hereinabove, the application of Phillip R. Antoine and Lan Thi Vuong-Antoine for the captioned facilities at Honolulu, Hawaii may be AND IS HEREBY GRANTED; that being so, the applications of C.E., Inc. and Lee Optical and Associated Companies Retirement and Pension Fund Trust must AND ARE HEREBY DENIED.

IT IS SO ORDERED.[7]

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Deputy Chief Administrative Law Judge*

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[7] Unless one of the parties takes an appeal from this Initial Decision by filing exceptions within 30 days after the date on which the full text hereof is publicly released, and unless the Commission reviews this case on its own motion, the Initial Decision will become effective 50 days after its public release pursuant to Section 1.267(d) of the Rules.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—*Martin Marietta*

FCC 85-416

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Applications of

MARTIN MARIETTA
COMMUNICATIONS SYSTEMS, INC.

For Authority to Construct, Launch and
Operate Space Stations in the Domestic
Fixed-Satellite Service

File Nos.
952/953-DSS-P/LA-84 954-DSS-P-84

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. Before the Commission are the above-captioned applications of Martin Marietta Communications Systems, Inc. (Martin Marietta) for authority to construct, launch and operate two domestic fixed-satellites in the 12/14 GHz bands and to construct a third as an on-ground spare. A motion to dismiss Martin Marietta's applications was filed by United States Satellite Systems, Inc. (USSSI). Comments were filed by American Satellite Company (ACS) and Satellite Business Systems (SBS). For the reasons discussed below, we deny the motion to dismiss and grant Martin Marietta's applications.

2. Martin Marietta is a Delaware corporation founded for the purpose of engaging in the provisions of domestic satellite and associated services. It is a wholly owned subsidiary of Martin Marietta Corporation. Its proposed satellite system will mark Martin Marietta's first entry into the domestic satellite industry for sale, lease and common carrier provision of telecommunications transmission services. Through its aerospace operations, the company has engaged in the design, development and manufacture of space systems. Martin Marietta Aerospace has been actively involved in the U.S. space programs.

3. The proposed satellites will carry 8 transponders, each with a bandwidth of 54 MHz and a nominal transmitter output power of 40 watts providing coverage of the 48 contiguous states, and either 1 or 2 transponders in each of 10 spot beams, each with a bandwidth of 235 MHz and a nominal transmitter output power of 2 to 10 watts. Coverage of the continguous states will be provided at a nominal EIRP level of 46.5 dBW; the nominal EIRP level of each of the spot beams will range from 49 to 56 dBW. Martin Marietta also proposes to serve Alaska, Hawaii and Puerto Rico/U.S. Virgin Islands, to the extent practical, from the orbit locations assigned. Its requested orbital locations are 73° W.L. and 75° W.L. Services are proposed to be offered on a common carrier and noncommon carrier basis.[1] Martin Marietta states that its proposed satellite system will be fully operational within a minimum of four years from the Commission's grant of construction permits. It estimates that the cost to construct, launch and operate its proposed system for one year is $423.5 million. Martin Marietta assets that both it and its parent, Martin Marietta Corporation, have sources of financing substantially in excess of the amounts required to construct the proposed system.

4. USSSI's principal objection to Martin Marietta's satellites is that Martin Marietta has submitted an incomplete engineering proposal that omits critical details, making analysis of the

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[1] In light of our decision to combine Title III and Section 214 authorizations in Domestic Fixed-Satellite Service, 84 FCC 2d 584 (1981), we have incorporated Martin Marietta's Section 214 filing submitted pursuant to Section 63.01 of the rules into the Title III applications captioned above. However, because it has not provided the information required by Domestic Fixed-Satellite Service: Transponder Sales, 90 FCC 2d 1238 (1982), it must be prepared to provide service only on a common carrier basis until the appropriate transponder sales authority is applied for and granted. *See, e.g.*, Rainbow Satellite, Inc., 94 FCC 2d 437 (1983).

proposal impossible. USSSI also alleges in the first round of comments, that Martin Marietta has not met the required financial showing of the *1983 Processing Order*.[2] ASC states that consideration of Martin Marietta's applications should be deferred because it will not launch its satellites until 1988. ACS also asks that Martin Marietta's request for contiguous orbital assignments be denied. SBS contends that any authorization Martin Marietta receives should be conditioned on the satisfactory reduction of potential interference due to EIRP levels of some of the spot beams used on its satellites. In response to SBS, Martin Marietta suggests that the Commission locate the Martin Marietta satellites next to satellites using similar EIRPs, if necessary, to relieve harmful interference.

5. We find that Martin Marietta is financially qualified to contract and launch its proposed system pursuant to our rules governing the financial qualifications of domestic fixed-satellite operators.[3] Martin Marietta Corporation has current assets of $918 million. In addition, it has a $500 million unsecured revolving credit agreement with Bank of America. Thus, we conclude that Martin Marietta has demonstrated its financial ability to construct, launch and operate its proposed satellite system.

6. Notwithstanding USSSI's claims regarding Martin Marietta's technical expertise, we find that Martin Marietta's applications contain sufficient information to determine that it is technically qualified. Moreover, we note that Martin Marietta's experience in the aerospace and satellite fields adds to our confidence that Martin Marietta is technically competent to construct its proposed system. We also conclude that, as a new entrant, Martin Marietta has proposed, as a new entrant, to have its entire system operational within in a reasonable time frame and thus we will not, as ASC suggests, defer action on its applications. Other issues raised by the parties with respect to orbital assignments are resolved in the *1985 Assignment Order*, FCC 85-396, adopted today, and will not be repeated here.[4]

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[2] Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983).

[3] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to immediately proceed with construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983).

[4] SBS's general concern pertaining to EIRP power levels of spot beams is, to the greatest extent possible, resolved in the context of today's *1985 Assignment*

7. Accordingly, IT IS ORDERED that Application File Nos. 952/953-DSS-P/LA-84 and 954-DSS-P-84 ARE GRANTED and Martin Marietta Communications Systems, Inc. IS AUTHORIZED to construct three space stations in the Fixed-Satellite Service in accordance with the terms, conditions and technical specifications set forth in its applications.

8. IT IS FURTHER ORDERED that Martin Marietta Communications Systems, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic fixed-satellite service in accordance with the Commission's decision in *Domestic Fixed-Satellite Service: Assignment of Orbital Locations*, FCC 85-396, (adopted July 25, 1985) (*1985 Orbital Assignment Order*).

9. IT IS FURTHER ORDERED that Martin Marietta Communications Systems, Inc. SHALL COMPLY with the requirements of the *1985 Orbital Assignment Order*, FCC 85-396, adopted today, as well as the terms and conditions of all other previous orders and authorizations.

10. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

	Construction Commenced	Construction Completed	Launch no later than
#1	July, 1986	January, 1989	July, 1989
#2	February, 1987	April, 1989	July, 1989
#3	May, 1987	July, 1989	ground spare

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Martin Marietta Communications Systems, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in the *1985 Orbit Assignment Order*, FCC 85-396, FCC 85-395 (adopted July 25, 1985). Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this

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Order, Any further problems pertaining to power levels will be resolved through coordination among the parties involved.

authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the motion to dismiss filed by United States Satellite Systems, Inc. IS DENIED.

13. Martin Marietta Communications Systems, Inc. is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to repond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Hearing
Multipoint Distribution Service, Authorization

Review Board affirms *ID* grant to comparative Public Coast Radio applicant who was preferred because of his superior facilities and services, more experienced personnel, more definite rates and practices, and better interconnection plan. —*Murray Cohen*

PR Docket No. 84-1312

FCC 86R-15

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
MURRAY COHEN, d/b/a MATS for a New Local Service (VHF) Public Coast Station at Old Saybrook, Connecticut	PR DOCKET NO. 84-1312 FILE NO. 226-M-L-83
EDWARD J. MULLARKEY For a New Local Service (VHF) Public Coast Station at Farmingville, New York	PR DOCKET NO. 84-1313 FILE NO. 353-M-L-53

Appearances

Lawrence M. Miller, on behalf of Murray Cohen, d/b/a MATS; *Thomas Carroccio*, on behalf of Edward J. Mullarkey; and *Loretta Garcia* and *Robert H. McNamara*, on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

Adopted: March 18, 1986; Released: March 21, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. Two individuals both propose new public VHF radio stations

to serve the local boating public in the nearby Connecticut and New York area. Since only one application can be granted, a trial type comparative hearing was held. In his Initial Decision, Administrative Law Judge (ALJ) Miller concluded that Murray Cohen's proposal was superior to that of Edward J. Mullarkey. FCC 85D-58, released September 20, 1985. Cohen was chosen because of his superior facilities and services, his more experienced personnel, more definite rates and practices, and better interconnection plan. Cohen's proposed method of operation was also found to be superior to Mullarkey's vague, incomplete, and possibly artificial proposal to provide service in conjunction with New York Telephone Company, ID Conclusions 13-14. After considering Mullarkey's brief and exceptions and the replies of Cohen and the Chief, Private Radio Bureau, as well as a rather full oral argument, held on January 17, 1986, Tr. 156-228, the Review Board has concluded that the ALJ's ID should be affirmed for the reasons, outlined in the Bureau's reply, which are discussed below.

2. *Background*: Both competing applicants proposed to provide a new local service to individual users by means of VHF Radio public coast stations. This is a non-broadcast service so that the comparative hearing in this case is not controlled by the standards set out in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Instead, the relevant comparative factors were identified in the following specific issues designated for hearing:

> a. To determine the facts with respect to the facilities, personnel, rates, practices, interconnection with land line facilities and services of each applicant, including the geographical area proposed to be served by each.
>
> b. To determine the nature and amount of traffic to be handled by each of the proposed stations and from what sources such traffic will be derived.
>
> c. To determine each applicant's proposed methods of operating local service public coast stations.
>
> d. To determine, in light of the evidence adduced on issues, (a), (b) and (c) above and in light of existing service available, which application should be granted in the public interest, convenience and necessity.

3. Cohen's application was ultimately found by the ALJ to be "vastly superior" to Mullarkey's proposal. I.D. Conc. 13. On several individual factors, Cohen was awarded: a *substantial* preference with respect to personnel, rates, and practices; a *slight* preference for the facilities and interconnection factors; and a *decisional* preference for proposed services. These individual

preferences when combined by the ALJ indicated that Cohen is the "clear victor" on Issue a. I.D. Conc. para. 10. After considering the nature, amount, and sources of maritime traffic, Issue b, the ALJ found that neither proposal warranted a preference. I.D. Conc. 11. Finally, Cohen's proposed methods of operation under Issue c were found to merit a *substantial* comparative preference over Mullarkey's who could not "supply any concrete operating procedures because he doesn't yet have any agreements with either NY Telco or his expected contractors." I.D. Conc. 12, Find. 28. Mullarkey's Brief challenges virtually all of these preferences, Br. 4-16; Cohen's reply attempts to justify even more decisive preferences than were awarded by the ALJ. It is the Private Radio Bureau which in its reply helps us focus on the crucial and decisional issues.

4. *Discussion*: The most troublesome aspect of this case is Mullarkey's suggestion that there was a "subcurrent running through this proceeding" (Br. 14) tending to prefer Cohen's proposal because he already operates several similar public coast stations whereas this is Mullarkey's first proposal. This hint or suggestion of unconscious bias in the hearing below may explain the lengthy oral argument — nearly twice the alloted time — in a case where the briefs and replies utilized only about a third of the pages allowed by the rules. After reviewing the record as highlighted by both the written and oral arguments, we agree with the Bureau that "no such undercurrent existed" in the proceedings below and that "both the Bureau's pleadings and the Initial Deicison were based solely on facts and arguments raised relative to the two proposed stations in this proceedings." PRB Reply 3-4. Our own review establishes that the weaknesses in both proposals were recognized by the Bureau and the ALJ in his Initial Decision. It is Mr. Mullarkey who refuses to recognize and acknowledge basic and near fatal flaws in his own proposal. Several dramatic examples of the overall weakness of his proposals are revealed by the record.

5. Mullarkey failed to establish the exact location of the control point for his proposed station. Belatedly at the hearing he indicated that the control point might be located at the switchboard of the New York Telephone Company in New York, but he failed to negotiate any such potential agreement with New York Telco. ID Finds. 6. Similarly, although Mullarkey intends to manage and supervise his proposed station to serve the New York-Connecticut area, he will not relocate to that area but will continue to reside in Fairfax County, Virginia and continue to

work for the U.S. Defense Department in nearby Crystal City. ID Find. 9. Mullarkey expects his station to be operated by New York Telco employees, and he proposes to contract for maintenance and repair personnel. *But*, no such agreements have been yet negotiated. ID Finds. 10. Mullarkey did not submit his own proposed tariff and will not engage in independent pricing; he simply expects that his eventual rates and services will be those maintained by the New York Telco. ID Find. 12, 14 19. Of necessity, his practices would also "in large part be determined by N.Y. Telco's operating procedures . . " ID Find. 14. In essence, Mullarkey will be an absentee owner who proposes to operate his station by ''contracting" for services with the New York Telco., which now "holds a near monopoly on marine services" in the Connecticut-New York area. ID Conc. 6, 14.

6. Cohen presently operates several public coast stations in New York, Norfolk, Va., and Boston, Mass., and has applied for several other licenses. ID Find. 8. He will maintain a common control point for all of his stations, which is already functioning, at his present business address in New York. I.D. Find. 9. Cohen proposes full time management of his station, but both the ALJ and the Bureau recognized that this would be "on a roving basis.'' I.D. Conc. 4, Tr. 189-190. Cohen did set out a detailed rate schedule, a list of eight different services, and a proposed tariff. I.D. Finds. 11, 17, 18. In sum, Cohen's proposal was preferred, not because he is an existing operator, but because Cohen's proposed method of operation, as the ALJ firmly held, is superior to Mullarkey's "vague and ersatz New York Telco proposal" which is tantamount to Mullarkey abdicating control to his largest competitor in the area. ID Conc. 6, 14.

7. Turning to Mullarkey's specific exceptions we agree with the Bureau, Reply p. 3, that, even if Mullarkey's arguments are accepted, he concedes that, at best, both applicants would be equal with respect to many factors. See Mullarkey's Br., paras, 19 and 22, regarding personnel; para. 25, tariff and rates; and para. 27, interconnection. Thus, as the Bureau correctly points out, Mullarkey's case really rests on: (a) his auxiliary power preference, (b) his larger service contour, and (c) his claim that Cohen's proposed and existing operation violates several Commission rules.

8. (a) Mullarkey was awarded a slight preference for auxiliary power, which was more than overcome by Cohen's slight preference for facilities. Cohen presented ample evidence of his proposed transmitter, Cohen Ex. A-1, transmitter site, Tr. 56, control point

location, Tr. pp. 56, 63, and antenna, Cohen App. p. 2. By contrast, Mullarkey presented a little evidence about his transmitter, Mullar. App. p. 6, antenna, Tr. 95, and auxiliary power, Mull. Ex. 2. But as previously noted he has not even decided where to locate his control point, and he has not yet negotiated an agreement with the New York Telco. Tr. 127-128.

9. (b) At the hearing, both Cohen and Mullarkey supplied mileage figures for thier services contours, but neither tendered traffic information which was sufficient to merit a "decisional" preference. ID Conc. 11. Mullarkey now requests a preference for his larger proposed service area. But, as the Bureau points out (Reply p. 4), Mullarkey failed to show whether the area of navigable water to be covered by his larger contour would have any boating traffic. The burden of proof is on the applicant to establish his comparative merits, 47 CFR 1.254, and the services issue required that the applicants show whether their proposals will best serve the public. Mullarkey simply failed to make a showing that his larger service area would serve the boating public. Moreover, in *Radio Telephone of Gainesville*, 46 FCC 2d 827, 30 RR 2d 247 (Rev. Bd. 1974), the Board required a similar showing in an earlier maritime radio hearing.

10. (c) Finally, Mullarkey continues to assert that Cohen should have been penalized for past and proposed violations of the Commission's rules. It claims that Cohen's proposed half-privacy service contravenes the Commission's rules. Br. 13. However, the ALJ accepted the Bureau's contention that "Section 81.312 permits a coast station to transmit a busy signal during periods of transmission when the coast station considers it to be necessary to minimize or avoid interference from other stations." Br. Reply Findings, pp. 1-2. We agree that Section 81.312 is broad enough to permit Cohen's suggested use of the busy signal to insure privacy interests. Mullarkey also argues that Cohen's proposed use of tone signals violates Section 81.132(b). Again, the ALJ accepted the Bureau's construction of the rule that "a coast station authorized for telephony (F3) emission may use the tone signalling for establishing and maintaining communications." Bur. Corrected Reply p. 1. Accordingly, Cohen's use of tone signals, which is directly related to maintaining ship-shore communications, does not violate the Commission's rules, as both the ALJ and the Bureau concluded below. The record regarding these and other alleged violations was probed in some detail at the oral argument, See O.A. Tr. 174-181, 187-188, 197-201, and 211-212. We are satisfied that both the Bureau and the ALJ correctly

applied the relevant Commission rules and the comparative standards for maritime comparative hearings, before concluding that the Cohen proposal was superior.[1]

11. ACCORDINGLY, IT IS ORDERED That the request filed October 22, 1986 to accept the late-filed exceptions of Edward J. Mullarkey IS GRANTED; and

12. IT IS FURTHER ORDERED That the application of Murray Cohen, (File No. 226-M-L-83) IS GRANTED, and the application of Edward J. Mullarkey (File No. 353-M-L-53) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

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[1] Since we agree that Mullarkey's slight preferences for auxiliary power and greater coverage are not sufficient to overcome Cohen's long lead, we need not reach Cohen's claim that it is entitled to a "outstanding point of superiority" under the Commission's doctrine first enunciated in *Contact*, 19 FCC 2d 566, 10 RR 660 (1954), because Mullarkey proposes to contract with another party for the operation and maintenance of this proposed station. On the other hand, we do disagree with Mullarkey that *Telephone Answering Service*, 8 RR 2d 1264 (1956), supports its claim that the Commission has long sanctioned use of contract personnel for day-to-day operation and maintenance of a proposed station. That case dealt only with the limited contracting of maintenance services, and not the broader delegation, if not abdication, proposed by Mullarkey in this case. See *Houston Mobilefone, Inc.*, 78 FCC 2d 1067, 1068–1070 (1980).

FCC 85D-58

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
MURRAY COHEN, d/b/a MATS for a New Local Service (VHF) Public Coast Station at Old Saybrook, Connecticut	PR DOCKET NO. 84-1312 FILE NO. 226-M-L-83
EDWARD J. MULLARKEY For a New Local Service (VHF) Public Coast Station at Farmingville, New York	PR DOCKET NO. 84-1313 FILE NO. 353-M-L-53

Appearances

Lawrence M. Miller on behalf of Murray Cohen, d/b/a MATS; *Thomas Carroccio* on behalf of Edward J. Mullarkey; and *Robert DeYoung* and *Loretta Garcia* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: September 17, 1985; Released: September 20, 1985

Preliminary Statement

1. Murray Cohen (Cohen) seeks authority to operate a new public coast station at Old Saybrook, Connecticut. Edward J. Mullarkey (Mullarkey) seeks similar authority for Farmingville, New York. Because those two applications are mutually-exclusive, the Chief, Private Radio Bureau has designated them for hearing on the following issues (50 F.R. 5677, published February 1, 1985):

> (a) To determine the facts with respect to the facilities, personnel, rates, practices, interconnection with land line facilities and services of each applicant, including the geographical area to be served by each.

(b) To determine the nature and amount of traffic to be handled by each of the proposed stations and from what sources such traffic would be derived.

(c) To determine each applicants' proposed methods of operating local service public coast stations.

(d) To determine, in light of the evidence adduced on Issues (a), (b), and (c) above in light of existing service available, which application should be granted in the public interest, convenience and necessity.

2. We held the prehearing conference on May 3, 1985. Direct case exhibits were exchanged the same day. The hearing was held on June 10, 1985, and the record was closed the same day. The parties filed their Proposed Findings of Fact and Conclusions of Law on July 26, 1985,[1] and their Reply Findings on August 7-8, 1985.[2]

Findings of Fact

Issue (a)

3. Under Issue (a) we must determine the facts for each applicant's facilities, personnel, rates, practices, interconnection with land line facilities, and services including the geographical area each would serve, and then compare them.

4. *Facilities. Cohen* will operate his station with a Motorola transmitter and a Decibel Inc. antenna. Station WLIS owns his transmitter site, and the control point will be located at his business address, 122 Library Lane, Mamoroneck, New York. Since Cohen already operates other coast stations his control point is already functioning. His antenna will be 144 feet above ground.

5. *Mullarkey* would use a General Electric transmitter, and would locate it at a site he owns on Long Island. He intends to have auxiliary power at the control sight, and to mount the antenna 21.25 feet above ground.

6. However, the record is ambiguous on the location of Mullarkey's control point. In his application and exhibits he indicates that the control point will be located at the site and connected to the marine switchboard of the New York Telephone Company at Hempstead, New York. But at the hearing, Mullarkey testified that the control point will be at NY Telco's

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[1] Murray Cohen and Edward Mullarkey each corrected their Proposed Findings of Fact on July 29, 1985. The Bureau corrected theirs on July 31, 1985.

[2] The Bureau corrected its Reply Findings on August 8, 1985, and Mullarkey corrected his on August 9th.

switchboard in Hempstead, New York. *Cf.* Mull. Appl. p. 1 and exhibits and Mull. Ex. 2 with Tr. 123–138.[3] In any event he presently has nothing on his site, and he hasn't negotiated any agreement with either NY Telco or the contractors.

7. *Personnel. Cohen* will manage the station himself, and will staff the control point. Since 1960 he has owned an electronic company, Rad-Com, Inc. He is a member of the National Marine Electronics Association, been an officer in that organization for two years, and holds an NMEA General Radiotelephone license and a technical certificate.

8. Cohen presently operates licensed stations in New York (WHU–638) and in Norfolk, Virginia (WHV–240). He now uses the same services at his New York station that he proposes for his Old Saybrook station. This includes automatic identification and direct dial (Tr. 45–46, 58). In addition Cohen has a license for a station at Boston, Massachusetts (WHU–742), and has applied for licenses at Harpswell, Maine; Harwood, Maryland; and Manasquan, New Jersey. He will use two FCC-licensed Rad-Com employees to operate and maintain his Old Saybrook and his other stations.

9. *Mullarkey*. Mullarkey intends to manage and superivse his own station. However, he will not relocate if his license is granted. Rather he will maintain his residence in Fairfax County, and continue his current employment with the Defense Department in Crystal City.

10. Mullarkey has no previous coast station operating experience. But between 1970 and 1975 he managed a team which was developing electronic systems for ocean shipping, including communications systems. His station will be operated by NY Telco employees under NY Tel's control under contract. Mullarkey proposes to contract for maintenance and repair personnel. As previously noted (Findings 6 *supra.*), he hasn't yet negotiated a contract with NY Telco.[4]

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[3] Mullarkey has never amended his application to change the location of his control point. So his direct testimony is at variance with the representations in his application.

[4] The NY Telco operators Mullarkey would use already oversee NY Telco's public coast stations at Riverhead, Bayshore, and New York, New York. These three stations currently provide coverage to portions of the very areas Mullarkey proposes to serve with his station (Tr. 99). In fact the NY Telco presently holds a near monopoly on marine services in this Connecticut/New York area (Tr. 148–149).

11. *Rates. Cohen* has submitted a proposed tariff for his station. His charges will depend on the service and status of the subscriber. They will range from $.20 a minute to $5.99 for a nonregistered subscriber two minute call. There will be a $150.00 annual registration charge. Cohen will not charge a fee for distress calls.

12. *Mullarkey* hasn't submitted a proposed tariff. Instead he proposes radio link and land line service rates that are "consistent with those maintained by" the NY Telco for marine services. His land line charges would be NY Telco's local or long distance rates.[5] The rates will fluctuate with those of NY Telco; i.e., Mullarkey will not engage in independent pricing (Mull. Ex. 3, p. 1; Tr. 97, 128–129, 136–138).

13. *Practices. Cohen* will make service available to any land or ship station within the station's coverage area. He will adjust the charges pro rata if there is defective service unless the customer causes the defective service. He reserves the right to require an additional deposit, and the right to terminate service when:

(a) the ship's operator violates Cohen's tariff or any state or federal law;

(b) any person using foul language or impersonates another person on the air;

(c) the ship's operator keeps the channel occupied without transmitting or receiving; or

(d) the ship hasn't paid amounts due.

14. *Mullarkey* says only that he will conduct all operations pursuant to Part 81 of the Commission's rules (Mull. Ex. 3), and supplies no specific practices. However, it seems clear that his practices will be in large part determined by NY Telco's operating procedures (Tr. 133).

15. *Interconnection With Land Line Facilities. Cohen* will interconnect long distance with the WATS network, and locally through the Southern New England Telephone Company.

16. *Mullarkey* will interconnect through NY Telco by way of a two-pointed land line if he can negotiate such an agreement. At this time the Riverhead, Bayshore, and New York stations use the NY Telco marine switchboard. All three stations are licensed to the NY Telco (Tr. 98).

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[5] When Mullarkey filed his application in 1983, NY Telco's local rates were $6.11 a month plus usage and terminal equipment charges. The long distance rates were $28.52 monthly plus usage and equipment charges. The latest maritime mobile rates that Mullarkey has supplied are NY Telco's 1979 VHF rates; i.e., $1.81 for the initial three minutes and $.55 for each additional minute.

17. *Services. Cohen* proposed eight different services: (a) operator assisted service; (b) direct customer dialed service;[6] (c) call forwarding; (d) safe boat arrival notification; (e) secretarial and booking services; (f) message handling and interconnection;[6] (g) half-privacy;[6] and (h) a float plan service. He proposes a network of stations along the coast with his existing and proposed stations (See Findings 8 *supra.*).

18. While the caller in Cohen's direct dial system will perceive the call to be automated, the operator at the control point will be in control. His half-privacy method will diminish the theft of credit card numbers by not retransmitting the ship's identification.

19. *Mullarkey* will serve a discrete service area, and his proposed area contour is larger than Cohen's. The services he will offer will be similar to those offered by the NY Telco stations in the area, but he has not yet negotiated a contract with NY Telco about providing specific services.

20. Mullarkey would offer "sent paid" and toll calls. The "sent paid" calls will be billed to Mullarkey's station which, in turn, will collect from the ship and pay the NY Telco. Toll calls must be placed through the NY Telco marine operator.

Issue (b)

21. Under Issue (b) we must determine the nature and amount of traffic to be handled by each proposed station and from what source such traffic would be derived.

22. *Cohen* projects the boat traffic for his proposed service area by adding about 12,500 slips in the coastal area to about 1500 slips on Long Island's north shore. Based on a survey Cohen conducted through his marine electronics business 26 people have indicated they would be interested in subscribing to his service. In addition, some people using his existing New York station have stated that they would be interested in using an Old Saybrook station when they were in that area.[7]

23. *Mullarkey* intends to handle local and transient boating and shipping traffic in the Atlantic Ocean south of Long Island, and in Long Island Sound. He also expects some traffic from offshore

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[6] Mullarkey's attack on Cohen's half-privacy, direct dial services, and his use of tone signals for interconnection and caller identification is rejected. Cohen's use of these services is not only legal, but desirable. See Private Radio Bureau's Reply Findings at paras. 1–6.

[7] Mats Ex. 8, p. 1.

oil exploration sites. However, he has provided no reliable data describing vessel traffic of any kind in the area (Tr. 78–79).

Issue (c)

24. Under Issue (c) we must examine each applicant's proposed methods of operating local service public coast stations.

25. *Cohen's* remote-controlled station will have operators available to assist subscribers. The operator receives the request for service notice, completes and logs the call. His computerized equipment will decode registration information and validate the caller's identity. The direct dial microphone sends a dual tone, multifrequency which the computer reads and verifies, and connects the caller with either a local or long distance line. If a distress call comes in, the operator can interrupt a directly dialed call and offer assistance to the vessel in distress. The operator could also disconnect any call which violates Cohen's tariff.

26. Under Cohen's automatic identification ssytem, the control operator can detect the calling vessel's signal and generate either a human or synthesized voice to identify the vessel at both the beginning and end of the call. Cohen's call forwarding service is like a telephone answering service. The caller leaves a message with the operator to be transmitted to its destination at a later time (Tr. 37).

27. All stations licensed to Cohen's proposed coastal network would be connected to a control point. A vessel at any point within the network could talk to the central operator. Under Cohen's "800" proposal the caller would dial the 800 number from the vessel; the operator would answer, ask which type of service the caller requests, and ascertain the ship's approximate location; she would then decide on which coastal station to call the vessel. The operator will be able to encode the DSC equipment to call the vessel automatically when ships are authorized for digital selective calling.

28. *Mullarkey* has proposed no specifics on his station operations, on his services, or on the extent to which he will control NY Telco operators.[8] He has no agreement with NY Telco about servicing calls if Mullarkey's station is busy when a call comes in, and he has no agreement on procedures for identifying the station at the beginning and end of the call (Tr. 110–111; 132–133). However, Mullarkey believes that the NY Telco operators would

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[8] Service operators wouldn't be under the control of Mullarkey, but under NY Telco's control (Tr. 94).

probably identify his station by voice using his call sign (Tr. 145-146).

Conclusions of Law

Issue (d)

1. After comparing the applicants under the facts adduced pursuant to Issues (a), (b) and (c), we must determine which application would best serve the public interest, convenience, and necessity, and therefore more deserving of a grant.

2. *Issue (a).* Turning first to the *facilities* each applicant will provide, Cohen deserves a slight preference over Mullarkey. On the one hand Cohen's control point is already functioning. Mullarkey's isn't. In fact we're not certain where Mullarkey's control point will be located. In any event, Mullarkey not only has nothing on his site at the present time, he has yet to negotiate any agreement with NY Telco and the contractors. So it would take Mullarkey a considerable amount of time to become operational. Thus, Cohen merits a preference because his facilities are operational. On the other hand the quality of Cohen's preference is negated somewhat since Mullarkey does propose auxiliary power at his control point (See Findings paras. 4-6 *supra.*).

3. Cohen's *person* proposal is substantially superior to Mullarkey's. While both applicants have considerable electronic's experience, Cohen has experience operating marine coast stations. In fact, he currently operates such stations. Mullarkey has no such stations in operation.

4. Moreover, Cohen offers full-time management by the owner on a roving basis. Mullarkey will only manage his station part-time. He has no intention of relocating his Virginia residence or discontinuing his employment with the Defense Department. Cohen intends to operate and maintain his station with his own employees. Mullarkey intends to contract with NY Telco for operators and with independent contractors for maintenance. But he hasn't done so yet (See Findings paras. 7-10 *supra.*).

5. Cohen's *rate* proposal is substantially superior to Mullarkey's. He has supplied a detailed rate schedule as of December, 1984. Mullarkey hasn't submitted any tariff. Instead he says his rates will be consistent with those maintained by NY Telco. Since Mullarkey hasn't itemized his proposed charges or fees, we can't directly compare them with Cohen's.

6. However, permitting Cohen to introduce his rate proposal would promote competition. NY Telco holds a near monopoly on

marine services in this Connecticut/New York area. Since Cohen would price his rates independently of NY Telco, a potential for pricing competition in the market exists, Mullarkey would provide no such competition. He will offer the services provided by NY Telco at its Riverhead, Bayshore, and New York, New York stations at NY Telco's charges. (See Findings paras. 11–12 *supra.*).

7. Cohen's proposed *practices* merit a substantial comparative preference. He has supplied detailed information about the practices to be used at his Old Saybrook station. These practices are already being used at his existing stations. Mullarkey has offered no specific data about his proposed practices (See Findings paras. 13–14 *supra.*).

8. Cohen deserves a slight preference under the *interconnection* criterion. Local interconnection is comparable for the two applicants. But Cohen's long distance interconnection is superior since he offers WATS interconnection (See Findings paras. 15–16 *supra.*).

9. Cohen's *services* offering is decisionally superior to Mullarkey's. He offers a wide range of services including an innovative half-privacy service and a "float-plan" service. Mullarkey offers the basic local and long distance services that are available through NY Telco (See Findings paras. 17–18 *supra.*).

10. In summary, under *Issue (a)*, Cohen is entitled to a slight preference over Mullarkey under the *facilities* and *interconnection* criteria, a substantial preference under the *personnel, rates* and practices criteria, and a decisional preference under the *services* criterion. This overwhelming comparative superiority makes Cohen the clear victor under Issue (a).

11. *Issue (b).* Neither applicant will be awarded a comparative preference under the "traffic" issue. While both applicants have set out the nature and amount of the traffic their proposed stations would handle, both showings are naturally speculative, and it cannot be said that either has employed superior data in arriving at the amount of traffic they would handle (See Findings paras. 21–23 *supra.*).

12. *Issue (c).* Cohen merits a substantial comparative preference for his superior proposed method of operation. He has provided concrete details about his operating procedures. Moreover, these operating methods are presently in operation at his other coast stations. On the other hand, Mullarkey can't supply any concrete operating procedures because he doesn't yet have agreements

with either NY Telco or his expected contractors (See Findings paras. 24-28 *supra.*).

Ultimate Conclusion

13. The public interest, convenience, and necessity would best be served by granting Murray Cohen's Old Saybrook Public Coast Station application. Comparatively Cohen's proposal is vastly superior to Edward Mullarkey's Farmingville, New York Public Coast Station application.

14. Cohen would operate superior *facilities* and *services* with more experienced *personnel*. He has more definitive *rates* and *practices*, and a better *interconnection* plan. His *proposed method of operation* is clearly superior to Mullarkey's vague and ersatz NY Telco proposal. All in all it is clear that Cohen would bring the best practicable service to the boating public.

SO, unless an appeal is taken from this Initial Decision, or the Commission reviews it on its own motion, the application of Murray Cohen, d/b/a MATS (File No. 226-M-L-83) IS GRANTED; and

The application of Edward J. Mullarkey (File No. 353-M-L-53) IS DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

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[9] If exceptions aren't filed within 30 days or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service denied on applicant's failure to demonstrate requisite financial qualifications.
—*National Exchange, Inc.*

FCC 85-417

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of NATIONAL EXCHANGE, INC. For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed Satellite Service.	File Nos. 1824/1825/1826/ 1827-DSS-P/LA-83, 1828-DSS-P-83, 955/956-DSS-P/LA-84, 957-DSS-P-84

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission has before it the above-captioned applications of National Exchange Inc. (NEX) for authority to construct, launch, and operate two domestic fixed-satellites in the 12/14 GHz bands and to construct a third satellite as an on-ground spare. On June 7, 1985, NEX submitted an amendment to three of its applications and requested permission to withdraw the remaining

five other applications it initially filed.[1] Petitions to Deny NEX's applications were filed by GTE Satellite Corporation (GSAT), American Satellite Company (ASC), GTE Spacenet Corporation (GTE Spacenet), Martin Marietta Communications Systems, Inc. (Martin Marietta) and Ford Aerospace Satellite Services Corporation (Ford). For the reasons set forth below, we deny NEX's applications.

2. NEX is a newly formed corporation, and its application offers little information regarding its corporate structure or purpose. NEX states that the cost to construct and launch its proposed facilities is $310.5 million. It plans to raise $60.8 million through an equity placement and $249.7 million through debt financing. NEX claims to have commitments for 53% of its financing requirements. These commitments consist of an option agreement with Burlington Northern, Inc. (BNI) granting BNI an option to purchase up to 35% of the equity securities to be issued by NEX. The total price of these securities is not to exceed $58.4 million. In addition, NEX asserts that BNI will provide $87.4 million in debt financing. Although there appears to be an agreement by BNI to furnish 35% of the debt financing required by NEX, this agreement was not described in NEX's applications but was merely alluded to in a letter from a BNI officer. NEX also states that Arianespace will provide launch services for NEX, and will arrange for financing of up to 80% of the launch costs.

3. We find that NEX has not demonstrated the requisite financing to construct and operate its proposed satellite system pursuant to Section 25.391(c) of the Commission's rules.[2] From the documentation submitted to the Commission, we conclude that NEX has no current assets or operating income. Thus, in order to comply with our rules, NEX must demonstrate other sources of financing for the $310 million in system costs. NEX relies upon its agreements with BNI and Arianespace to support

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[1] All applicants were provided with an opportunity to amend their applications after the Commission issued a *Notice of Proposed Rulemaking* regarding the qualifications of domestic Fixed-Satellite operators. FCC 85-238, CC Docket No. 85-135 (released May 7, 1985). NEX amended its application on June 7, 1985. To the extent that any of the comments on this supplemental information have been rendered moot by the adoption of the final rules, they will not be discussed here.

[2] These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with construction, launch and operation of their proposed systems upon grant. *See* Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1982); Domestic Fixed-Satellite Service, 90 FCC 2d 1(1982); Report and Order in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

its claim that it has obtained 53 percent of the required funds. However, none of these arrangements seems to have gone beyond the preliminary planning stage.

4. The BNI option to purchase 35 percent of NEX's equity offering is subject to approval by BNI's Board of Directors. In addition, under terms of the agreement BNI may purchase any amount of NEX's equity offering up to a maximum of 35 percent with no minimum guaranteed. Thus, BNI appears to be under no obligation to purchase any equity in NEX.

5. The only evidence presented to the Commission concerning BNI's commitment to supply $87.4 million in debt financing for NEX's proposal is a statement in a letter from a BNI officer that "BNI understands that its equity participation includes the provision of appropriate support for 35% of the remaining financing used to finance NEX's costs of construction, launch and other initial expenses . . . ."[3] Because BNI's debt financing is tied to its equity participation, it appears that this commitment is subject to the same "Board approval." The Commission has no way of determining whether BNI's debt financing offer is subject to any other condition or contingencies because the specific terms of the agreement have never been submitted to the Commission.[4]

6. Finally, NEX claims that Arianespace has committed $55.86 million to its project. However, the offer NEX relies upon indicates that Arianespace will arrange for a maximum of 80% of the total cost of launch services to be financed by a pool of European banks. This financing arrangement is subject to NEX making "appropriate guarantees" to COFACE and the French Export Credit Insurance Company, and a "first rank bank" making appropriate guarantees to the European banks.[5]

7. These documents fit precisely within the category of arrangements that we have found insufficient to demonstrate financial qualifications. Our rules state that financing arrangements based upon further performance by either party will not be considered.[6] Letters from institutions indicating an interest in purchasing an unspecified equity interest, subject to board approval, or a

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[3] Letter from Luino Dell'osso, Jr., Vice President, Burlington Northern, Inc. to Clay T. Whitehead, President, National Exchange, Inc. (June 6, 1985).

[4] Our rules for demonstrating financial qualifications require the submission of specific terms of the loan. 47 C.F.R. § 25.391(d)(2)(i), (iii).

[5] Letter from Jean-Claude Biget, Vice-President, Arianespace to Clay Whitehead, President, National Exchange, Inc. (June 4, 1985).

[6] 47 C.F.R. § 25.391(d)(2)(iii).

willingness to assist in arranging financing provide no assurance that the necessary funds will be obtained.[7]

8. Thus, on the basis of the information submitted by NEX, we conclude that it has not demonstrated that it has satisfied our rules and policies and its applications will be denied.[8]

9. Because we have concluded that NEX is not financially qualified to construct its proposed satellites, we need not reach the nonfinancial issues raised by the petitions to deny and will dismiss those petitions as being moot.

10. Accordingly, IT IS ORDERED that the applications of National Exchange, Inc., File Nos. 1824/1825-DSS-P/LA-83, 1828-DSS-P-84, for authority to construct launch and operate two domestic satellites and to construct a third satellite as an on-ground spare ARE DENIED.

11. IT IS FURTHER ORDERED that the applications of National Exchange, Inc., File Nos. 955/956-DSS-P/LA-84, 957-DSS-P-84 and 1826/1827-DSS-P/LA-84, ARE DISMISSED per applicant's request.

12. IT IS FURTHER ORDERED that the Petitions to Deny filed by American Satellite Company, Ford Aerospace Satellite Services Corporation, GTE Satellite Corporation, GTE Spacenet Corporation and Martin Marietta Communications Systems, Inc. ARE GRANTED to the extent set forth above and DISMISSED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[7] *See Notice* at para. 22. Moreover, this financing does not even meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g.,* West Jersey Broadcasting Co., 89 FCC 2d 478 (1978).

[8] U.S. v. Storer Broadcasting, 351 U.S. 192 (1956).

Privileged Communications

Review Board grants appeal from ALJ's ruling rejecting privilege claims. Board concluded that ALJ had properly found that most of the documents were not protected under attorney-client privilege. it disagreed with the ALJ, however, that the documents be produced, finding that all of the documents were shielded from discovery under attorney work-product doctrine.

—*Opal Chadwell*
MM Docket No. 85-269

FCC 85R-6

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	MM Do. No. 85-269
OPAL CHADWELL	File No. BPCT-850103KK
DOROTHY O. SCHULZE AND DEBORAH BRIGHAM, A GENERAL PARTNERSHIP	File No. BPCT-850320KG
BLANCO COMMUNICATIONS, LTD.	File No. BPCT-850320LC
For Construction Permit for a New Television Station Blanco, Texas	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1986; Released: February 6, 1986.

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed December 13, 1985 by Opal Chadwell (Chadwell) from a Memorandum Opinion and Order released December 10, 1985 (FCC

85M-4832) by presiding Administrative Law Judge (ALJ) Walter C. Miller denying Chadwell's privilege claims pertaining to fourteen documents sought by Blanco Communications, Ltd. (Blanco) in a discovery motion in this proceeding and ordering the documents to be made available to Blanco for inspection and copying.[1] Chadwell urges reversal of the ALJ's Order, claiming that the disputed documents fall within the ambit of the attorney-client privilege or, at least with respect to one document, the work-product doctrine, and are thus protected from diclosure. Blanco filed an opposition to the appeal on December 20, 1985. Based on our examination *in camera* of the documents submitted by Chadwell, we conclude that although the ALJ properly rejected the attorney-client privilege claim relative to most of the disputed documents, he erred in failing to evaluate separately Chadwell's work-product contentions which, we hold, successfully shield all of the documents from discovery.

2. The attorney-client privilege "allows a client to prevent the disclosure of information" communicated to an attorney "for the purpose of securing legal assistance," *U.S.* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950), and is intended to encourage complete disclosure of facts between client and attorney on the rationale that the latter can act effectively only if fully advised of all pertinent facts by the party he represents. *Id.* Because of the inherent tension, however, between the "need to encourage free and open discussion by clients in the course of legal representation" and the "need for the disclosure of all relevant information," the privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle." *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 384 (D.D.C. 1978). The elements considered necessary by this agency, *see Central Alabama Broadcasters, Inc.*, 73 FCC 2d 146, 149, 45 RR 2d 1744, 1747 (1979), to trigger the applicability of

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[1] A presiding officer's ruling requiring the production of documents over objections based on a claim of privilege is appealable as a matter of right pursuant to Section 1.301(a)(2) of the Commission's Rules, 47 CFR 1.301(a)(2). *But see Little Rock Telephone Co., Inc.*, 90 FCC 2d 132 (Rev. Bd. 1982), where an appeal was denied because appellant had failed to oppose the motion for production of documents before the ALJ. Also before the Board is Chadwell's motion, filed simultaneously with the appeal, for stay of the ALJ's ruling. The Board orally notified the parties on December 13 that the stay was granted — the documents otherwise were to have been made available that same day — to afford us an opportunity to review fully the appeal. *See Gene Sudduth Co., Inc.*, FCC 84R-62, released September 4, 1984 (stay granted to allow the Board an opportunity to review the case). This opinion, in addition to ruling on the appeal, memoralizes our oral ruling.

the privilege are set forth in *U.S.* v. *United Shoe Machinery Corp., supra,* at 358-359:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the prupose of securing primarily either (i) an opinion of law or (ii) legal service or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

It is also generally accepted that the privilege extends to communications from the attorney to the client, at least to the extent that such communications might tend to reveal confidential facts disclosed by the client. *See Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974); *In re Ampicillin Antitrust Litigation, supra*, at 389. Communciations by an attorney to a client "based solely upon public documents such as patents, statutes, decisional law, or information supplied by third parties, or sources other than the client's disclosures" fall outside the protection of the attorney-client privilege. *Sperti Products Inc.* v. *Coca-Cola Co.*, 262 F. Supp. 148, 149 (D. Del 1966). Moreover, voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege. *See In re Sealed Case,* 676 F.2d 793, 809 (D.C. Cir. 1982); *Little Rock Telephone Co., Inc., supra.*

3. The work-product doctrine is broader than, and distinct from, the attorney-client privilege. It had its genesis in the Supreme Court's interpretation of the federal rules of discovery in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Federal Rule of Civil Procedure 26(b)(3), adopted in 1970, conveniently summarizes the current doctrine as follows:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other pary's representative (including his attorney, consultant . . . or agent) only upon a showing that the party seeking discovery has substantial need of the materials . . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

As a "qualified immunity from discovery," 8 Wright and Miller, *Federal Practice and Procedure*, § 2025, at 212 (1970), the work-product doctrine assures an attorney (or other representative of a party) that his private files and the thoughts, opinions, and theories reflected therein will remain free from intrusions by opposing counsel, absent special circumstances. The doctine is part of Commission jurisprudence and has been treated in recent cases, such as *RKO General, Inc. (KHJ-TV)*, 97 FCC 2d 423, 55 RR 2d 1179 (1984), and *A.S.D. Answer Service, Inc.*, 96 FCC 2d 886, 55 RR 2d 743, *modified*, 56 RR 2d 233 (1984), albeit only in the context of requested discovery of documents unrelated to the preparation or initial prosecution of Commission applications (unlike the documents sought in the instant case). With these basic principles in mind, we now turn to the disputed documents.

4. For discussion purposes, we have divided the documents into separate categories, which we shall first analyze under the attorney-client privilege and then under the work-product doctrine. The first category includes two documents (#18, #24), a letter and a note, from the client to her attorney. The ALJ found that the privilege against disclosure did not apply to these documents because the information had been made available to a third party thus waiving the privilege. Our examination of the documents *in camera*, however, fails to reveal a third-party waiver. With respect to document #18, a summary of a conference discussion, the ALJ is correct that the subject matter about which the document is concerned had been discussed earlier by the client with a third party, but such discussion of the underlying information, by itself, does not provide a legal basis for stripping away the immunity against disclosure in the absence of any indication that the specifc document or its content was revealed to a third party. The mere fact that the document contains information knwn to others does not destroy the immunity from disclosure. *See In re Ampicillin Antitrust Litigation, supra*, at 390. Chadwell represents that there was no actual release of the document to any third party, and the document on its face lends no support to a contrary finding. Thus, since there is absent any indication that the communication was disclosed by the client, document #18 falls within the protection of the attorney-client privilege and need not be produced. The other document (#24) consists of the client's proposed responses to various discovery requests. Although the information in final form is obviously meant to be relayed to other parties, the material in question, which includes a note and a compilation of documents

and responses, in effect constitutes a preliminary attorney-client consultation during the discovery process, which by its nature was not intended to be made public. Rather, the information was relayed to counsel for his legal advice, subject to any modification or revision that counsel might deem appropriate. Thus, document #24 is also protected under the attorney-client privilege. *See Gross Telecasting, Inc.*, 39 RR 2d 1640, 1645 (1977) (draft press release sent to counsel held to be privileged material).

5. The next category includes seven letters an one memorandum from the attorney to the client, *i.e.*, documents #12, 13, 14, 15, 16, 20, 26, and 31. With respect to documents #12, 13, 14 and 15, the ALJ held that the privilege did not apply to "incomplete" documents, where the face of the documents showed there were enclosures wtih the originals but the documents submitted had no such enclosures. The ALJ's rationale (relying on *Patterson Communications Associates*, 41 RR 2d 1027, 1030 para. 7 (ALJ 1977)) apparently was that, without the enclosures, one could not accurately determine whether the attorney's communications were based on public information or on confidential disclosures by the client. Documents #16, 20, and 26 were considered unprotected because they were either ministerial in nature or based on public information. And document #31 was found by the ALJ to have been made available to a third party, thus waiving the privilege. We concur with the ALJ that the subject correspondence from Chadwell's attorney is not protected from disclosure under the attorney-client privilege. We disagree, however, that the fact that enclosures were omitted with respect to four of the documents is significant here because the documents on their face explain the nature of the enclosures and permit an assessment of the source upon which the attorney's communications are based. Our examination of each of the eight documents reveals that the correspondence is based on information other than confidential information provided by the client and that disclosure would not reveal any confidental communications. The documents are thus not protected under the attorney-client privilege. *See Coummunity Sav. & L Ass'n* v. *Federal Home Loan Bank Bd.*, 68 F.R.D. 378 (E.D. Wis. 1975).

6. The third category includes two intra-office legal memoranda, documents #19 and #30, prepared by Chadwell's attorneys. The ALJ denied the claim of attorney-client privilege for both documents on grounds that the allegedly privileged information had been made available to a third party and thus waived. The apparent basis for the ALJ's ruling was that both documents

include a carbon copy notation to a third person. Chadwell points out, however, that the latter person is also one of Chadwell's attorneys, who entered an appearance in the case and signed most of the pleadings. Additionally, document #19 was prepared from document #18, the client's summary of a conference discussion that we found privileged in paragraph 4, *supra.* In light of this finding and the fact that the carbon copy is to one of Chadwell's attorneys, we perceive no basis for concluding that documents #19 and 30 lost their protected status.

7. Finally, documents #11 and #21 consist of a letter from Chadwell's lawyer to the client's engineer retaining the latter's services and a letter from the engineer to the lawyer enclosing an antenna bid. The ALJ stated that because the first document was incomplete and because the second letter was not addressed to the client, the attorney-client privilege did not apply. Chadwell argues as to document #11 that the lack of an enclosure does not defeat the privilege, and contends with respect to document #21 that it is protected by the work-product doctrine, not the attorney-client privilege. We agree with the ALJ that neither document is protected by the attorney-client privilege because, by definition, that privilege does not protect correspondence between an attorney and a non-client third party.

8. We now turn to Chadwell's work-product doctrine arguments against permitting discovery of any of the 14 disputed documents. The matter is analytically straightforward. However, it has been complicated by the fact that although Chadwell separately argued for non-disclosure of all 14 documents under the attorney-client and work-product rubrics in her November 25, 1985 "Opposition to Request for *In Camera* Inspection and Issuance of Order to Compel Production of Documents," and asserted in that pleading and in a December 2, 1985 filing that "these documents are privileged under the attorney-client and/or work product privilege," the ALJ's discovery Order, FCC 85M-4832, *supra*, elided this bifurcated defense into a single "privilege claim" and failed to rule separately on Chadwell's work-product arguments. Chadwell then compounded the confusion in the instant appeal by primarily disputing the ALJ's attorney-client privilege rulings and only secondarily reasserting her work-product defense (see paragraph 7, *supra*). Nevertheless, we conclude that Chadwell has sufficiently reargued the latter ground for non-disclosure to preserve her position and require the *de novo* examination of her claim.

9. In a work-product discovery analysis, the date on which litigation "could reasonably have been anticipated" has major importance among the considerations set forth in paragraph 3, *supra. See A.S.D. Answer, Inc., supra,* 56 RR 2d at 235. In the instant case, Chadwell filed her application for a television construction permit for Channel 52 on January 3, 1985. However, her planning began months before, as illustrated by document # 11, an August 29, 1984 letter from Chadwell's attorney to the client's consulting engineer retaining the latter's services. The other 13 disputed documents span a period from October 15, 1984 through November 6, 1985 and concern preparation or prosecution of the Chadwell application. We must also consider the general proposition that there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of litigation. *See A.S.D. Answer Service, Inc., supra,* 96 FCC 2d at 891, 55 RR 2d at 747; *Federal Practice and Procedure, supra,* § 2024, at 199.

10. While we would be loath to hold as a matter of law that all FCC applications are prepared and filed with reasonable anticipation that competing applications and litigation will follow, we take official notice that out of 465 television applications for new stations or major changes in facilities processed by the Commission from October 1, 1983 through September 30, 1984, a full 50.8% were designated for hearing. FCC, *Fiftieth Annual Report/Fiscal Year 1984* 90 (1985). Given these odds, we have no difficulty holding that Chadwell's Channel 52 application was conceived, prepared, and prosecuted *ab inito* with reasonable anticipation that litigation would follow. Indeed, Document # 12, dated October 15, 1984, reveals that even two and one-half months before the Chadwell application was filed, Chadwell's attorney was already "checking other filings at FCC for Channel 52" (Chadwell's Nov. 11 descriptive list of discovery-related documents, at 2). Thus, since all of the disputed documents were prepared either by or for Chadwell's attorneys or consulting engineer in reasonable anticipation of litigation, the only remaining question is whether any of the documents were "prepared in the regular course of business," which would make them discoverable. Obviously, the "regular business" of communications attorneys and consulting engineers is the prepration and prosecution of Commission applications. To treat all of their litigaton-related work-product as done in the regular course of business would render nugatory the work-product doctrine in the communications litigation field. Such a result was surely not intended by the

"regular business" exception. Hence, we conclude that none of the 14 disputed documents were prepared in the "regular course of business," as that phrase is normally understood, and that all 14 documents are immune from discovery under the work-product doctrine (as well as to the extent that they enjoy the attorney-client privilege under paragraphs 4–7, *supra*).

11. ACCORDINGLY, IT IS ORDERED, That the motion for stay and the interlocutory appeal as of right, both filed by Opal Chadwell on December 13, 1985, ARE GRANTED, and Opal Chadwell NEED NOT PRODUCE Documents # 11 through # 16, # 18 through # 21, # 24, # 26, # 30, and # 31.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications.
> —*Rainbow Satellite, Inc.*

FCC 85-418

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
RAINBOW SATELLITE, INC.	File Nos. 958-DSS-LA-84 959-P/L-84 960-DSS-P-84
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of Rainbow Satellite, Inc. (Rainbow) requesting authority to launch and operate a third 12/14 GHz satellite previously authorized as an on-ground spare, to construct, launch and operate a fourth 12/14 GHz satellite and to construct a fifth such satellite to be used as an on-ground spare.[1] Petitions to deny were

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[1] Rainbow was authorized to construct three satellites and launch and operate two in the 12/14 GHz band. Rainbow Satellite, Inc., 94 FCC 2d 437 (1983). This authority was conditioned on Rainbow's demonstration of its financial qualifications. These authorizations were declared null and void because Rainbow failed to fulfill the required conditions. Rainbow Satellite, Inc., Mimeo No. 2584

filed by American Satellite Company (ASC), GTE Satellite Corporation (GSAT), GTE Spacenet Corporation (GTE Spacenet) and Martin Marietta Communications Systems, Inc. (Martin Marietta). In addition, Martin Marietta filed a motion to dismiss and a supplemental motion to dismiss. Comments were filed by Satellite Business Systems (SBS). For the reasons set forth below, we deny Rainbow's applications.[2]

2. Rainbow is a corporation coequally owned by Trexor Corporation and Rainbow Communications, Inc. The former is a publically held corporation primarily engaged in providing financial services and telecommunications consulting and engineering services. Rainbow estimates the cost of construction and launch of its system to be $250 million. It relies on the net profits that would be generated by its RSI I and RSI II satellites, equity and joint venture contributions, pre-launch transponder sales and/or leases, and debt financing to meet all capital and operating expenses. Rainbow claims on ongoing financial relationship with Citibank in connection with its RSI I, II, and III satellites and intends to rely on Citibank as the lead institution in a snydicate of commercial lenders. In order to demonstrate Citibank's commitment to the proposal, Rainbow includes in its application a letter in which Citibank describes itself as Rainbow's "chief financial advisor in connection with the first three Rainbow satellities."[3]

3. The majority of comments and petitions directed toward Rainbow's application are based upon its failure to demonstrate its financial qualifications.[4] In addition, the commenters argue that Rainbow has failed to obtain funds for its first project, let alone for this one.[5]

(released February 14, 1985). In a related action taken today we deny Rainbow's Application for Review, FCC 85-393 (adopted July 25, 1985).

[2] All applicants were provided with a final opportunity to amend their applications after the Commission issued a *Notice of Proposed Rulemaking* regarding the qualifications of Domestic Fixed-Satellite operators, FCC 85-238, CC Docket No. 85-135 (released May 7, 1985). Rainbow did not amend its application. Accordingly, we rely on the information in its November 7, 1983 application to determine its qualifications.

[3] Citibank states in this letter, however, that provision of financing for the Rainbow system would be contingent upon Rainbow's obtaining an appropriate level of capitalization either through pre-launch sales and creditworthy leases of transponder capacity, entering into a joint-venture, or obtaining additional investment. Also, it states its financing would be contingent upon Rainbow's securing insurance coverage acceptable to Citibank, procurement of launch services, and regulatory approval.

[4] The first round of pleadings was filed before Rainbow submitted its financial documents.

[5] Several commenters also raise other issues in opposition to Rainbow's applications. For example, Western Union and Martin Marietta argue that

4. We find that Rainbow has not demonstrated the requisite financing to construct, launch and operate its proposed satellite system pursuant to the Commission's rules.[6] Rainbow presents no evidence of assets, income or debt financing sufficient to support a contrary finding. Instead, Rainbow relies on speculative projections of future profits which would be generated by the operation of two satellites, the authorizations of which have been declared null and void. We will not consider those projections as evidence of income. Rainbow also relies on an arrangement with Citibank to provide financing contingent upon, *inter alia* Rainbow's obtaining an additional source of capital. We have found this type of financing arrangement insufficient to demonstrate financial qualifications. Section 25.391(d)(2)(iii) of our Rules, provides that financing arrangements contingent on further performance by either party will not be considered. The fact that Citibank agrees to provide financing contingent upon Rainbow raising additional capital does not provide us with any assurance that Rainbow can in fact raise the additional capital.[7] Thus, we will not consider the arrangement with Citibank as evidence of Rainbow's financial capability. Therefore, we conclude that Rainbow has not satisfied our requirements to demonstrate that it has sources of financing currently available sufficient to construct, launch and operate its proposed system and its applications will be denied.[8]

5. Accordingly, IT IS ORDERED that the applications of Rainbow Satellite Inc. to launch and operate a third 12/14 GHz satellite; to construct, launch and operate a fourth satellite and to construct a fifth satellite to be used as an on-ground spare, Application File Nos. 958-DSS-LA-84, 959-P/LA-84 and 960-DSS-P-84 ARE DENIED.

Rainbow failed to justify a request for more than two locations with service projections. ACS considers Rainbow a new entrant because it has not yet fulfilled the conditions placed on the first authorizations. Ford asserts that Rainbow has not submitted a complying interference analysis. Our decision to deny Rainbow's applications rests on its failure to demonstrate its financial qualifications and therefore we need not address these other issues.

[6] These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with construction, launch and operation of their proposed system upon grant. *See* Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982); Report and Order in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

[7] *See Notice* at para. 22. Moreover, this financing does not even meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g.*, West Jersey Broadcasting, Co., 89 FCC 2d 478 (1978).

[8] U.S. V. Storer 351 U.S. 192 (1956).

6. IT IS FURTHER ORDERED that the Petitions to Deny filed by American Satellite Company, GTE Satellite Corporation, GTE Spacenet Corporation and Martin Marietta Communications Systems, Inc. ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> **Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.**
> **—*RCA American Com., Inc.***

FCC 85-419

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of	
RCA AMERICAN COMMUNICATIONS, INC.	**File Nos. 961/962/963-DSS-P/LA-8**
For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of RCA American Communications, Inc. (RCA Americom) for authority to construct, launch and operate additional domestic satellites. As amended on June 7, 1985, RCA Americom is requesting one hybrid 4/6/12/14 GHz and two single band satellites in both the 4/6 GHz and 12/14 GHz band or, alternately, three single band satellites in each band. Martin Marietta Communications Systems, Inc. (Martin Marietta) filed a petiton to deny RCA Americom's applications and Ford Aerospace Satellite Services Corporation (Ford) has filed a supplemental petition to deny based on RCA Americom's application for one additional 4/6 GHz satellite.

2. RCA American Communications, Inc. (RCA Americom) is a wholly-owned subsidiary of RCA Corporation. It provides a variety of telecommunications services including video and audio services, commercial channels and data services and services to the U.S. Government. It is authorized to operate five satellites at 4/6 GHz.[1] In addition, it is authorized to construct and launch three 12/14 GHz satellites and to construct one on-ground spare. 94 FCC 2d 441 (1983). None of these 12/14 GHz satellites is launched as yet.

3. At 4/6 GHz, the proposed satellites will carry 24 transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 10 watts. Coverage will be provided of the 48 contiguous states. At 12/14 GHz, the proposed satellites will carry 16 transponders, each with a bandwidth of 54 MHz and a nominal transmitter output power of 50 watts.

4. In its petition to deny, Martin Marietta asserts that RCA Americom has failed to justify its request for additional orbit locations with firm customer commitments. Ford, in a supplemental petition to deny filed in response to RCA Americom's June 7, 1985 amendment has also challenged RCA Americom's proposal on the basis that it has not justified the need for additional orbit locations.

5. We find that RCA Americom has demonstrated its financial qualifications pursuant to our rules governing the financial qualifications of domestic fixed-satellite operators.[2] The financial information it submitted shows that its parent company, from whom it has a funding commitment, has current assets of $4.03 billon in addition to a line of credit for $1.2 billion. The construction, launch and operational cost of the one satellite for which RCA Americom is receiving authorization in this order[3] is

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[1] *See* RCA Global Communications, 56 FCC 2d 660 (1975); RCA American Communications, Inc., 75 FCC 2d 531 (1979); RCA American Communications, Inc., 84 FCC 2d 633 (1981). In 1983, RCA Americom was authorized to construct and operate a sixth in-orbit Satcom satellite, then designated Satcom-5. However, that satellite was sold to Alascom, Inc., and is jointly licensed to RCA Americom and Alascom for use primarily by Alascom. *See Alascom, Inc.*, FCC 82T-25 (released October 25, 1982). In our *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985), we have taken that satellite into account as an Alascom satellite designated Aurora-1.

[2] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditonal Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to immediately proceed with construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983).

[3] *See* discussion at paras. 6-7 *infra*.

approximately $120 million and thus it has met the financial capability standard.

6. In accordance with a rule codifying the Commission's traditional policy of granting one expansion location when existing satellites are essentially filled, we will assign RCA Americom a sixth 4/6 GHz satellite orbital location.[4] RCA Americom's requests for two other 4/6 GHz satellites will be denied.

7. In addition, because RCA Americom is currently authorized to launch three satellites in the 12/14 GHz bands and none of these has been launched, its requests for three additional orbit locations in that frequency band and its request for a hybrid position in both bands will also be denied.[5]

8. Accordingly, IT IS ORDERED that Application File Nos. 965-DSS-P/LA-84 IS GRANTED and RCA American Communications, Inc. IS AUTHORIZED to construct one domestic communications satellite in accordance with the terms, conditions and technical specifications set forth in its application.

9. IT IS FURTHER ORDERED that Application File Nos. 961/966/967/968/969/970-DSS-P/LA-84 ARE DENIED.

10. IT IS FURTHER ORDERED that Application File Nos. 962/963-DSS-P/LA-84 and 964-DSS-P-84 ARE DISMISSED at applicant's request.

11. IT IS FURTHER ORDERED that RCA American Communications, Inc. IS AUTHORIZED to launch and operate one space station in the domestic fixed-satellite service in accordance with the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985).

12. IT IS FURTHER ORDERED that RCA American Communications, Inc. SHALL COMPLY with the requirements of the *1985 Assignment Order*, FCC 85-396, (adopted July 25, 1985), as well as the terms and conditions of all other previous orders and authorizations.

13. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in

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[4] C.F.R. § 25.391(h). *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). This rule states that each licensee will be assigned only one additional location in each frequency band in which it is operating provided that its in-orbit satellites are essentially filled and that it has no more than two unused locations for authorized but unlaunched satellites.

[5] We note that two of RCA Americom's proposed satellites are not intended to be launched until September, 1991. Grant of these requests would conflict with the policies set forth in the *Report and Order*, FCC 85-135, FCC 85-395 (adopted July 25, 1985) at para. 24.

accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates.

	Construction Commenced	*Construction Completed*	*Launch no later than*
Satcom VII	January, 1987	April, 1989	June, 1989

14. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to RCA American Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-135, in CC Docket No. 85-135, or *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985). Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

15. IT IS FURTHER ORDERED that the Petitions to Deny filed by Martin Marietta Communications Systems, Inc. and Ford Aerospace Satellite Services Corporation ARE DENIED.

16. RCA American Communications, Inc. is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION,

WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> **Applications to construct and launch space stations in the domestic fixed — satellite service granted conditioned on applicant's submitting evidence of parent corporation's commitment to provide support.**
> **—*Satellite Business Systems***

FCC 85-420

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
SATELLITE BUSINESS SYSTEMS For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and to Sell Transponders on a Noncommon Carrier Basis	File Nos. 1-DSS-P/LA-83; 971/972/973— DSS-P/LA-84

ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of Satellite Business Systems (SBS) to construct, launch and operate a sixth domestic satellite in the 12/14 GHz bands, and to construct, launch and operate three satellites to replace ones currently in-orbit. A Petition to Deny was filed by Ford Aerospace Satellite Services Corporation (Ford), and comments were filed by American Satellite Company (ASC), National Exchange, Inc. (NEX) and Federal Express Corporation (Federal Express).

For the reasons set forth below, we grant SBS's applications subject to certain conditions.

2. SBS is a partnership of wholly-owned subsidiaries of IBM and Aetna Casualty Insurance Company (Aetna).[1] SBS is currently authorized to operate five satellites in the 12/14 GHz bands, four of which have been launched.[2]

3. The first of SBS's proposed satellites, SBS-6, is intended to operate as a replacement for SBS-1.[3] The satellite is proposed to carry 19 transponders, each with a bandwidth of 43 MHz and a nominal transmitter output power of 41 watts with spot beams added to permit 50-state coverage. In addition, switchable travelling wave tube amplifiers will allow 20-watt or 40-watt operation for selected wideband channels. The proposed launch date is July, 1987. Of the remaining proposed satellites, two are intended to replace SBS-1 and SBS-2 in May, 1988 and December, 1990, and one is intended as SBS's sixth operational satellite for which assignment of 93° W.L. is requested. The proposed launch date for the sixth operational satellite is December, 1987. Each of these satellites will carry 19 transponders, each with a bandwidth of 41.3 MHz and a nominal transmitter output power of 40 watts. Coverage will be provided of the contiguous 48 states, and eastern and western regional beams will be provided. Services are proposed to be offered on a common carrier basis. However, authority is also requested to sell, or lease on a long-term sale-type basis, up to five transponders on the replacement satellites and up to ten transponders on the sixth operational satellite on a noncommon carrier basis in the same manner as its

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[1] IBM has recently agreed to acquire Aetna's ownership interest in SBS. In addition, MCI has agreed in principle to acquire through merger substantially all of the assets and operations of SBS, although IBM would retain three of the six proposed in-orbit SBS satellites. No formal applications have as yet been filed with the Commission and we will therefore proceed with the processing of SBS's applications as they are currently before us. Our action today is without prejudice to any Commission action on applications that might be filed in the future with respect to this transaction.

[2] Satellite Business Systems, 94 FCC 2d 447 (1983); Satellite Business Systems, FCC 82-489 (released November 10, 1982); Satellite Business Systems, FCC 81-467 (released October 5, 1981); Satellite Business Systems, 62 FCC 2d 997 (1977), *aff'd sum nom.* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

[3] This satellite was initially intended as an on-ground spare and is being constructed pursuant to a Section 319(d) waiver. *See Public Notice* DS-108 and DS-183 of October 20, 1982 and June 29, 1983, respectively. On November 7, 1983, SBS requested that this application be amended to include launch authority. *See Public Notice*, Report No. DS-265 (March 12, 1984). On December 21, 1984, SBS filed an application to modify the technical design of the satellite. *See Public Notice*, Report No. DS-360 (January 9, 1985).

previously authorized transponder transactions on SBS-III.[4]

4. SBS estimates the cost to construct its proposed system and to operate it for a year to be $325 million. SBS relies on support from its parent companies, a $550 million loan agreement from the Bank of America of which $150 million remains available to be withdrawn, a $104 million cash infusion realized by the leveraged lease financing of SBS-4 transponders, and its assets and cash flow to finance the proposed system. It also asserts that it requires a sixth orbital position in mid-1989 to meet traffic growth.

5. ASC objects to SBS's request for a fourth contiguous orbital location and asks that action be deferred in light of the proposed launch dates. Ford claims that SBS has not adequately justified its request for a sixth operational satellite, and that its proposal is technically inefficient. NEX argues that SBS has not provided sufficient documentation to substantiate its claim that it is financially qualified and Federal Express contends it has not provided a commitment of financial support from the parent companies on which it is relying. SBS replies that the launch dates are justified in light of the long lead time necessary, that increasing demand requires additional capacity, that its satellites meet Commission technical standards, and that its noted sources of funds are more than sufficient to permit SBS to proceed with the procurement of its four proposed satellites.

6. We find that SBS would be financially qualified pursuant to the Commission's rules governing the financial qualifications of domestic fixed-satellite operators if its assertion that it can rely on the funds of its parent is justified.[5] The cost of SBS's proposed system in $425 million. SBS's balance sheet indicates that it has $64.3 million of current assets. It also has $150 million available to be drawn on its $550 million credit facility with a syndicate of banks led by Bank of America, NT&SA as agent. This credit facility provides for a revolving line of credit convertible into a term loan. For any remaining funding needed, SBS states that IBM has committed funds to SBS's satellite programs in the past and will continue to provide financial support. Although the ability of IBM and Aetna to finance a

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[4] Satellite Business Sysems, FCC 83-403 (November 2, 1983).

[5] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with the construction, launch and operation of their proposed systems. *See* Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982).

satellite system is clear, no evidence has been submitted from either parent's management indicating a commitment to assist in financing SBS's proposed satellites. Our proposed rule on this point did not specifically state — although it did imply — that a management commitment from an applicant's parent corporations was required. Because SBS could have misunderstood our proposed rules, and because we would find it financially qualified if its parent companies were committed to making available the necessary funds, we will issue SBS conditional grants as reflected in para. 7, below. These grants will be conditioned on SBS submitting evidence of management commitments from one or both of its parent companies as required by in Section 25.391(d)(1) of our rules within thirty days of the release of this order. Failure to fulfill this requirement by that date will automatically render the grants null and void.

7. In accord with our rules granting one expansion location when existing satellites are essentially filled,[6] we will grant SBS conditional authority to construct and launch a sixth operational satellite. In addition, its requests for replacement satellites are fully consistent with the policy enunciated in the *Report and Order*, FCC 85-395, and will be granted. Contrary to ASC's position, we find that SBS will launch its replacement satellites in a reasonable time frame. Other issues raised with respect to orbital assignments are resolved in the *1985 Assignment Order*, FCC 85-396, adopted today. We also find that SBS's satellites satisfy Commission technical standards. Finally, based on SBS's representations, we find that its unopposed transponder transactions are noncommon carrier in nature and are otherwise consistent with the *Transponder Sales Order*.[7]

8. Accordingly, IT IS ORDERED that applications File Nos. 1-DSS-P/LA-83, 971/972/973-DSS-P/LA-84 ARE GRANTED and Satellite Business Systems IS AUTHORIZED to construct four space stations in the domestic fixed-satellite service in accordance with the terms, conditions and technical specifications set forth in its applications.

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[6] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

[7] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). With the sale of these transponders and the others approved today, a total of 24.7% of all authorized transponders will be available on a noncommon carrier basis. This is not significantly different from the 21.7% of the then authorized transponders we considered with approval in the *Transponder Sales Order*.

9. IT IS FURTHER ORDERED that Satellite Business Systems IS AUTHORIZED to launch and operate four space stations in the domestic fixed-satellite service in accordance with the *1985 Assignment Order*, FCC 85-396, adoped today.

10. IT IS FURTHER ORDERED that Satellite Business Systems SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396, adopted today, as well as the terms and conditions of all other previous orders and authorizations.

11. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the sapce station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations.

	Construction Commenced	*Construction Completed*	*Launch no later than*
SBS-6	October, 1983	October, 1986	July, 1987
SBS-7	December, 1985	June, 1987	December, 1987
SBS-8	March, 1986	January, 1988	July, 1988
SBS-9	February, 1987	December, 1989	December, 1990

12. IT IS FURTHER ORDERED that these authorizations shall become null and void in the event Satellite Business Systems fails to provide evidence of the required financial commitment from its parent companies within 30 days of the release of this order in accordance with the policies specified in the *Report and Order* in CC Docket No. 85-135, FCC 85-395, adopted today.

13. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Satellite Business Systems is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or *1985 Orbit Assignment Order*, FCC 85-396. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the

Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

14. IT IS FURTHER ORDERED that Satellite Business Systems IS AUTHORIZED to sell up to ten transponders on its sixth operational satellite and up to five transponders on each of its replacement satellites, in accordance with Comission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982); *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F. 2d 1465 (D.C. Cir. 1984).

15. IT IS FURTHER ORDERED that the Petition to Deny filed by Ford Aerospace Satellite Services Corporation ARE DENIED.

16. Satellite Business Systems is afforded thirty days from the date of release of this *Order and Authorization* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Mutually Exclusive
Application, Filing by New Applicant v. Renewal
Rules, Interpretation of

Share-time issue designated under Section 73.561(b) where renewal applicant had not broadcast at least 12 hours per day each day during the year preceding the filing of competing application for share-time arrangement.
— *Seattle Public Schools*
MM Docket No. 86-49

Rules, Interpretation of

Section 73.3517 proscribes only the filing of applications which are contingent upon action on another application which is pending before the Commission.
—*Seattle Public Schools*
MM Docket No. 86-49

FCC 86-71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	MM Docket No. 86-49
Seattle Public Schools	
For Renewal of License For Station KNHC(FM), Seattle, Washington	File No. BRED-830922AQ
and	
Jack Straw Memorial Foundation Seattle, Washington	
Req: 89.5 MHz, Channel 208C; 100 kW(H), 96 kW(V); 348 meters (H & V)	File No. BPED-840103AM
For Construction Permit for a New FM Station	

HEARING DESIGNATION ORDER

Adopted: February 3, 1986; Released: February 7, 1986

BY THE COMMISSION:

1. The Commission has before it: (a) an application for renewal of license for station KNHC(FM), Seattle, Washington, filed on September 22, 1983, by the Seattle Public Schools ("School System"); (b) an application to operate on the frequency currently occupied by KNHC, filed on January 3, 1984, by Jack Straw Memorial Foundation ("Jack Straw"); (c) the School System's December 8, 1984, "Petition to Deny or Dismiss" Jack Straw's application; and (d) related responsive pleadings.

2. Jack Straw proposes to share the specified frequency with the School System on a mutually acceptable basis. However, because of an uncertainty as to the applicability of 47 C.F.R. § 73.561(b), which provides for applications for share-time operations, Jack Straw prepared its application "to ensure its favorable consideration regardless of how the Commission's Rules are interpreted." Specifically, while that application proposes "unlimited time operation," it states that it was "filed pursuant to and consistent with the intent and meaning of [47 C.F.R. § 73.561(b).]"[1] Further, the application "emphasize[s] that [Jack Straw] is not seeking to displace the [School System] as the licensed operator on the channel currently occupied exclusively by station KNHC," but instead "hopes through this application to ultimately share this channel with the [School System] on a mutually acceptable basis." Jack Straw Application at Ex. 1, pp. 1–2. As indicated in paragraph 7, *infra*, Jack Straw's application shall be treated as an application to share time.

3. In its petition, the School System argues, on the basis of the above extracts from Jack Straw's application, that the application contains "two separate and distinct, yet conflicting proposals": one to share time on the channel presently used exclusively by KNHC and the other to operate full time on that channel. The School System contends that making alternative proposals in a single application violates the spirit of the Commission's Rules on contingent and conflicting applications, 47 C.F.R. §§ 73.3517, 73.3518. Accordingly, the School System

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[1] The response to the pertinent item of FCC Form 340 which proposes unlimited time operation refers to a statement in an Exhibit appended to the application. The Exhibit qualifies the unlimited-time proposal and clearly enunciates the intent of the applicant to seek a share-time authorization.

maintains that Jack Staw's application must be either dismissed or denied. With respect to the proposal to share time, the School System also asserts that "there is nothing in [Section 73.561(b)] to indicate that another applicant may file for time sharing where the licensee is operating at least 12 hours per day." Petition at 2. The School System states that KNHC has operated more than 12 hours per day since April 7, 1983, and plans to continue such operation in the future. The School System argues that those hours of operation exceed the level set by Section 73.561(b) and, therefore, that it cannot be forced to share time with Jack Straw.

4. The School System's argument that the alternative proposals for full-time and part-time operation contained in Jack Straw's application make that application inconsistent with the spirit behind Sections 73.3517 and 73.3518 of the Rules misconstrues those rules. Section 73.3517 proscribes only the filing of applications which are contingent upon action on another application pending before the Commission. *See Contingent Applications in the Broadcast Services*, 22 RR 299 (1961), in conjunction with former FCC Form 301, p. 1, item 3 (Mar. 1960). *See also Contingent Applications*, 61 FCC 2d 238 (1976). Jack Straw's application is not now, and never has been, contingent upon Commission action on any other application. Section 73.3518 provides that "[w]here an application is pending and undecided before the Commission, no subsequent inconsistent or conflicting application may be filed by or on behalf of the same applicant, successor or assignee." There is not now, and there has never been, any application pending before the Commission filed by or on behalf of Jack Straw which was or is inconsistent or in conflict with Jack Straw's instant application. The Commission's longstanding policy with regard to competing applications for full-time operation on the same noncommercial educational channel is to direct the presiding Administrative Law Judge to consider whether a share-time arrangement would serve the public interest better than would operation restricted to a single licensee. *See Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (Broadcast Bur. 1978). *See also Cleveland Board of Education*, 87 FCC 2d 9, 16 (1981). In view of that policy, the inclusion of alternative proposals for full-time and part-time operation in Jack Straw's application provides no ground for dismissing or denying that application. The proffering of those alternatives did not make Jack Straw's application "contingent," "inconsistent," or "conflicting" within the meaning of the Commission's Rules, but instead was a reasonable response to Jack

Straw's uncertainty as to what effect, if any, KNHC's hours of operation at the time Jack Straw filed its application would have on an application which proposed only part-time operation. Jack Straw's application repeatedly indicates that Jack Straw intended its application to be treated as an application to share time unless the Commission were to find that Section 73.561(b) did not apply to the School System. Accordingly, we will examine whether that rule is applicable in this case.

5. Section 73.561(b) states, in pertinent part, that any noncommercial educational FM station "which do[es] not operate 12 hours per day each day of the year, will be required to share use of the frequency [on which the station operates] upon the grant of an appropriate application proposing such share time arrangement." A licensee opposing an application for time sharing on the ground that the station's hours of operation exceed the level established by this rule must provide the Commission with a "compilation of the hours broadcast" showing that its station had broadcast "at least 12 hours per day each day of the year." *Noncommercial Educational Stations*, 44 RR 2d 235, 252 (1978). Implicit in the requirement for a "compilation of the hours broadcast" is a requirement that a licensee's showing be based upon its *established record* of having broadcast "at least 12 hours per day each day of the year." Jack Straw filed its construction permit application on January 3, 1984. According to the information provided by the School System, as of Jack Straw's filing date, KNHC had been operating continuously for at least 12 hours per day only since April 7, 1983, a period of less than nine months.[2] It appears from the record that Jack Straw approached the School System in the Spring of 1981 concerning the possibility of sharing time on the channel occupied by KNHC. Two years later, in Spring, 1983, Jack Straw presented the School System with a written presentation containing a share-time proposal after renewed discussions initiated by Jack Straw on that subject. At about the time of the renewed verbal overtures, KNHC increased the duration of its daily operations to at least 12 hours per day. We do not construe the language of the rule to literally require 12 hours of broadcasting every single day for an entire year to prevent the invocation of the rule. Nor does the rule's invocation mandate time sharing where, as in this case, the parties have been unable to agree on operating hours.[3] But the circumstances

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[2] Immediately prior those nine months, the pleadings indicate that the School System broadcast an average of approximately 67 hours per week.

[3] Section 73.561(b) states that each station "which does not operate 12 hours per

presented here, including broadcasting at less than the required hours for a quarter of the year prior to the Jack Straw filing plus the circumstances surrounding the return to a longer broadcast schedule (immediately following Jack Straw's renewed approaches to the School System on the matter of sharing time), persuade us that Jack Straw is entitled under the terms of the rule to have its application considered through the hearing process.

6. The conclusion that the School System is not exempt from the possibility of forced time sharing under Section 73.561(b) leaves open the question whether we should treat Jack Straw's application as an application to share time rather than as an application for full-time operation on the specified frequency. In answering this question, we find it significant that the subject applications will have to be designated for a comparative hearing on a share-time issue regardless of how Jack Straw's application is treated. *Compare Granfalloon Denver Educational Broadcasting, Inc.*, *supra* (share-time issue designated where application for full-time operation conflicted with renewal application) *with Southern Keswick, Inc.*, 34 FCC 2d 624, 626 (1972) (share-time issue would be designated where share-time applications conflict). Therefore, the question of how we should treat Jack Straw's application is, in effect, a question whether the School System should have to face the prospect of losing its license for KNHC entirely.

7. We believe that the School System should not have to face that prospect. The School System is fully qualified to remain a Commission licensee. Its license renewal application for KNHC would have been granted routinely but for Jack Straw's competing application for the specified frequency. Moreover, Jack Straw's stated goal in filing its application was to obtain a share-time arrangement with the School System, and that application makes clear Jack Straw's intent to have its application treated as an application to share time in the event the School System can be forced to share time under Section 73.561(b).

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day each day of the year, will be required to share use of the frequency" on which it operates. But the rule also states that the station will be required to do so "upon the grant of an appropriate application proposing [a] share time arrangement." We do not interpret this section as providing an absolute right to share time for any applicant proposing such use. Rather, a decision as to whether a shared use application is "appropriate" within the meaning of that rule requires a public interest determination by the presiding Administrative Law Judge, just as any application for a broadcast facility does. In particular, as in this case, the Judge will be required to make a determination of whether full-time use by the School System on an expanded schedule or shared use between the School System and Jack Straw is preferred. *See* ¶¶ 7, 14, *infra*.

Inasmuch as paragraph 5, *supra*, holds that the School System must face the prospect of sharing time under that rule, we will treat Jack Straw's application as an application to share time and designate the subject applications for a comparative hearing on a share-time issue. *Cf. Southern Keswick, Inc.*, *supra* at 626. In taking that action, we note that while operating at least 12 hours per day for less than one year prior to the filing of an application to share time and a statement of future intention to operate at least 12 hours per day every day do not exempt a licensee from the *possibility* of involuntary time sharing, the presiding Administrative Law Judge may consider the licensee's entire record during the license term for which renewal is sought as well as the licensee's statement of future intention, in determining whether the public interest would be served by a share-time arrangement between the renewal applicant and the share-time applicant rather than by the renewal applicant's continued, increased operating schedule.[4] See, *e.g.*, *Committee for Community Access v. F.C.C.*, 737 F.2d 74, 77 (D.C. Cir. 1984). Accordingly, our action here should not be construed as implying that the School System's broadcast record has been less than meritorious, or that a share-time arrangement between the School System and Jack Straw would serve the public interest better than would operation restricted to the School System. *See, e.g., Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983).

8. Section II, item 2a, of Form 340 asks each applicant for a new noncommercial educational station to state whether it is a nonprofit educational *institution*. Jack Straw's "yes" answer to this question appears to be inconsistent with that applicant's articles of incorporaton. Section II of Jack Straw's articles states that Jack Straw is a corporation organized "exclusively" for "the establishment and operation for educational and cultural purposes of one or more radio broadcasting stations . . . ." Such corporations are classified as nonprofit educational organizations rather than nonprofit educational institutions. *Lower Cape Communications, Inc.*, 47 RR 2d 1577, 1578 (1980). Accordingly, Jack Straw shall be required to submit an amendment either setting forth Jack Straw's basis for claiming to be a nonprofit educational institution or specifying that Jack Straw is a nonprofit educational organization. In the event the amendment specifies that

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[4] We note, for example, that the School System operated KNHC at least 12 hours per day from January 1, 1980, through August 31, 1982, and from April 7, 1983, through the completion of the pleading cycle in this case.

Jack Straw is a nonprofit educational organization, Jack Straw will be required to submit an additional amendment responding to section II, item 2b, of Form 340, which directs each nonprofit educational organization applying for a construction permit for a new noncommercial educational station to submit an exhibit stating how the proposed station would be used for the advancement of an educational program. In the event Jack Straw's submissions are deficient, the presiding Administrative Law Judge shall specify an appropriate issue directed to Jack Straw's basic qualifications (or lack thereof) to be a noncommercial educational FM licensee.

9. The financial information submitted by Jack Straw does not demonstrate its financial qualifications. That information fails to indicate the total cost of constructing the proposed station,[5] and whether sufficient funds will be available to cover these costs as well as operational costs for the first three months.[6] Accordingly, an appropriate issue will be specified. *See South Florida Broadcasting Co.*, 94 FCC 2d 452 (1983).

10. Jack Straw has not indicated whether it has provided local notice of the filing of its application, as required by 47 C.F.R. § 73.3580(f). To avoid delay, we will waive 47 C.F.R. § 73.3564(c) on our own motion, and require Jack Straw to provide local notice of its application, if it has not already done so, and so inform the presiding Administrative Law Judge within thirty days of the release of this order.

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[5] Section III of Jack Straw's application makes reference to its Exhibit 4 in an apparent attempt to provide the costs of obtaining monitoring and studio equipment, land, and buildings for the proposed station. Exhibit 4, however, is merely an equipment inventory for station KRAB(FM), Seattle, Washington, a station which Jack Straw had sold to SCS, Inc. *See* Application for Assignment of License, BALED-830620GR, granted February 7, 1984. Furthermore, Exhibit 6 to Jack Straw's construction permit application indicates that at least some of the equipment listed in Exhibit 4 was sold to SCS, Inc.

[6] Jack Straw indicates that the proceeds from the KRAB sale may not be available for the construction and first three-month operation of the proposed station, and therefore, proposes to rely on a $250,000 loan from the Reginald A. Fessenden Fund ("Fund"). That loan, however, is contingent on Jack Straw's agreeing to make the Fund a party to the trust deed on certain real property; and there is no indication that Jack Straw has agreed to meet that contingency. While the KRAB sale was consummated after Jack Straw filed its construction permit application, Jack Straw has not updated its application to indicate whether the proceeds of the sale will be available for the construction and first three-month operation of the proposed station. Since Jack Straw's application proposed reliance on the loan rather than on the sale proceeds, Jack Straw was entitled to assume that there would be no decisionally significant question regarding the availability of those proceeds. Therefore, no 47 C.F.R. § 1.65 issue will be specified.

11. Jack Straw has proposed a transmitter site at Cougar Mountain, Washington. This location is the site of numerous transmitters, and was recently the subject of a joint survey by the United States Environmental Protection Agency and the Commission's Office of Science and Technology which determined that in some areas human exposure to radio frequency (RF) radiation emitted by the transmitters currently in operation exceeded the guidelines adopted by the Commission in its *Report and Order in Gen. Docket No. 79-144*, FCC 85-90, 100 FCC 2d 543 (1985), *recon. denied in pertinent part, Memorandum Opinion and Order in Gen. Docket 79-144*, 50 Fed. Reg. 38653 (1985).[7] A proposed operation which would exceed those guidelines or which would increase the extent to which those guidelines are being exceeded would constitute a major environmental action. 47 C.F.R. § 1.1305(d); *Report and Order in Gen. Docket No. 79-144, supra* at 561. Accordingly, Jack Straw will be directed to determine whether the operation of its proposed facility, together with the continuation of the operations presently at Cougar Mountain, would result in RF radiation levels exceeding those guidelines, and to submit its findings to the presiding Administrative Law Judge within thirty days of the release of this order. If Jack Straw determines that the guidelines would be exceeded, Jack Straw shall, in addition, submit to the presiding Administrative Law Judge an environmental narrative complying in all respects with 47 C.F.R. § 1.1311. Jack Straw shall file a copy of each submission with the Chief, Audio Services Division, who will then proceed in this matter in accordance with the provisions of 47 C.F.R. § 1.1313(b). We will waive 47 C.F.R. § 1.1317 to the extent that the comparative phase of the case may begin before the completion of the environmental phase. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied*, 83 FCC 2d 337 (1980).

12. Except as may be indicated by the issues specified below, the School System and Jack Straw are qualified to operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding upon the issues specified below.

13. Accordingly, IT IS ORDERED, That the "Petition to Deny or Dismiss," filed December 8, 1984, by the Seattle Public Schools, IS DENIED.

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[7] Those guidelines are set forth in *OST Bulletin No. 65, Evaluating Compliance with FCC Specified Guidelines for Human Exposure to Radiofrequency Radiation*, 33-35 (Oct. 1985).

14. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the applications of the Seattle Public Schools and Jack Straw Memorial Foundation ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and a place to be specified in a subsequent Order, upon the following issues:

1. To determine whether, in light of the evidence adduced concerning the deficiency set forth in paragraph 9, *supra*, Jack Straw is financially qualified.
2. If a final environmental impact statement is issued with respect to Jack Straw which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment.
    - (a) to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301–19; and
    - (b) whether, in light of the evidence adduced pursuant to (a) above, Jack Straw is qualified to construct and operate as proposed.
3. To determine whether a share-time arrangement between the School System and Jack Straw would result in more effective use of the specified channel than would operation restricted to the School System and thus better serve the public interest, and, if so, the terms and conditions of the arrangement.[8]

15. IT IS FURTHER ORDERED, That, in the event the applicants are otherwise qualified, the presiding Administrative Law Judge shall take the following action:

1. If it is determined pursuant to issue 3, *supra*, that a share-time arrangement between the School System and Jack Straw would result in more effective use of the specified channel than would operation restricted to the School System, grant the applications of the School System and Jack Straw to the extent consistent with the terms and conditions of the arrangement determined pursuant to that issue; or
2. If it is determined pursuant to issue 3, *supra*, that operation restricted to the School System would result in more effective use of the specified channel than would a share-time arrangement between the School System and Jack Straw, grant the application of the School System and deny the application of Jack Straw.

16. IT IS FURTHER ORDERED, That within thirty days of the release of this order, Jack Straw shall either

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[8] Our action in specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or during the hearing, from negotiating a settlement on their own.

1. inform the presiding Administrative Law Judge of its basis for claiming to be a nonprofit educational instituton, or
2. specify that it is a nonprofit educational organization and show how its proposed station would be used for the advancement of an educational purpose.

17. IT IS FURTHER ORDERED, That 47 C.F.R. § 73.3564(c) IS WAIVED to the extent indicated herein. Within thirty days of the release of this Order, Jack Straw shall inform the presiding Administrative Law Judge as to whether local notice of the filing of its application has been published.

18. IT IS FURTHER ORDERED, That 47 C.F.R. § 1.1317 IS WAIVED to the extent indicated herein. Within thirty days of the release of this Order Jack Straw shall submit to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division:

(1) its findings as to whether the operation of its proposed facility, together with the continuation of the operations presently at Cougar Mountain, would result in RF radiation levels exceeding Commission guidelines, cited in paragraph 11, above; and

(2) in the event Jack Straw finds that the guidelines would be exceeded, an environmental narrative complying in all respects with 47 C.F.R. § 1.1311.

19. IT IS FURTHER ORDERED, That, in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within twenty days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 311(a)(2), and 47 C.F.R. § 73.3594, shall give notice of the hearing within the time and in the manner

prescribed in such Rule, and shall advise the Commission of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION,

WILLIAM J. TRICARICO, *Secretary*

Depreciation Rates

> This Order will prescribe depreciation rates and amortization amounts for the telephone companies and accounts/subaccounts shown in the Appendix to the Order.
> —*So. Bell Tel. & Tel. Co.*

FCC 86-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages
of Depreciation pursuant to the
Communications Act of 1934, as amended
for: Southern Bell Telephone and
Telegraph Company

ORDER

Adopted: January 27, 1986; Released: January 29, 1986

BY THE COMMISSION:

I. INTRODUCTION

1. The Communications Act of 1934, as amended, grants this Commission the authority to prescribe depreciation rates for common carriers and to revise these rates when it deems necessary. By this order we prescribe revised depreciation rates and amortizations for the Georgia and North Carolina jurisdictions of the Southern Bell Telephone and Telegraph Company (Southern Bell) using straight-line vintage group remaining-life, straight-line equal life group remaining-life, and amortization procedures.

II. BACKGROUND

A. Methods

2. We approved the use of the straight-line equal life group remaining-life procedures in our final decision in *Property Depreci-*

ation, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981). The remaining-life procedure is designed to distribute the unrecovered cost of an account over its estimated average remaining life. The equal life group procedure was adopted to allow for depreciation at rates more representative of consumption of capital than that allowed by the use of the vintage group procedure which had been used exclusively prior to our decision in Docket No. 20188. In accordance with our decision in that Docket we implemented rates using these new procedures in the depreciation prescription orders which we adopted beginning in 1981. In *Depreciation Rates*, 99 FCC 2d 1094 (1984) we provided for amortization of depreciation reserve imbalances in certain circumstances. This order represents a continuation of these procedures.

B. Review Procedures

3. For many years it has been our practice to review and revise depreciation rates for one-third of the major domestic telephone companies every year. Thus, every three years depreciation rates for all the major telephone companies are reviewed and revised as we find necessary. In recent depreciation orders we have discussed the increased volatility of depreciation rates using the new procedures and concluded it may be necessary to update the rates annually to keep them in line with accounting activity (i.e., plant additions, retirements, and net salvage). Under our direction, in 1983 our staff established streamlined study procedures whereby carriers could file for the annual update of rates between triennial reviews, using the same life and net salvage estimates that underlie prescribed rates.

4. Southern Bell did not comply with the procedures that are staff established for the processing of annual updates.[1] Nevertheless, we have concluded that the public interest would be served by processing this request. All carriers are expected to comply with such procedures in the future. Failure to do so may preclude our processing of the filing or request.

5. As discussed above, in September of 1985 Southern Bell filed for revised rates using our staff's annual update procedures. Inasmuch as the rates under consideration here are based upon

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[1] In March of 1985 our staff wrote Southern Bell to ask if it were planning a 1985 annual update filing. Southern Bell verbally notified our staff that it did not intend to file a study in 1985. However, Southern Bell notified our staff in early September 1985, that it intended to file a annual update later that same month.

equipment life and net salvage estimates underlying prescribed rates rather than revised estimates based upon new studies, some of the time and effort normally expended in a review was not required here. Furthermore, since these estimates had been discussed at length in a prior three-way meeting[2] it was not necessary to conduct such a meeting during 1985. Instead, the questions that were raised during this update review process were discussed in correspondence, telephone conversations, and informal meetings with representatives of the Company and state commissions. As a result of the review and discussion, Southern Bell submitted revised filings.

6. After discussing the matters with the carrier and respective state commissions, our staff issued a Public notice dated December 10, 1985, entitled, "Depreciation Rate Prescriptions and Annual Amortization Expense Amounts for the Southern Bell Telephone and Telegraph Company — Notice of Opportunity for Comment." The staff transmitted to the company and the state commissions involved a copy of the Public Notice. Only one party submitted comments in response to the Public Notice, and it supported the filing.

III. DISCUSSION

A. Rates and Amortizations

7. In past prescription orders we have approved the use of amortization procedures in lieu of remaining-life rates to resolve certain reserve imbalance problems.[3] In our 1984 review of Illinois Bell's depreciation rates, Illinois Bell stated that the competitive situation in its operating area was such that if it were not allowed to recover its reserve deficiency more rapidly than the use of remaining-life rates would allow, it would not have a reasonable opportunity to recover all of its embedded costs. The Illinois Commerce Commission agreed with Illinois Bell and further stated that the increased revenue requirements that would result from a more rapid write-off of reserve deficiencies would not place an undue burden on Illinois Bell's ratepayers. We agreed with the

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[2] It has been our practice to hold three-way meetings between representatives of the telephone carriers and the staffs of the respective state commission(s) and our Commission to discuss and resolve many of the issues raised in the carriers' depreciation rate filings. Such a meeting was held to discuss Southern Bell's rates in February of 1983.

[3] *See Depreciation Rates*, 99 FCC 2d 1094 (1984) *aff'd sub nom. Southern Bell Telephone and Telegraph Company v. FCC*, #84-1638 (D.C. Cir., Jan. 17, 1986). *See also Depreciation Rates* 101 FCC 2d 137 (1985), FCC Order 85-568, released October 23, 1985, and FCC Order 85-656, released December 31, 1985.

Illinois Commission's views, and we prescribed amortization procedures instead of remaining-life procedures to correct the reserve imbalance in most of Illinois Bell's accounts.

8. In Southern Bell's filing it proposed a procedure to amortize reserve imbalances in its Georgia and North Carolina jurisdictions for essentially the same reasons as Illinois Bell did in 1984. The Georgia and North Carolina Commissions agreed with Southern Bell that the amortization procedure should be used so that it would have a better chance of recovering its embedded costs. Furthermore, these commissions stated that the additional revenue requirement that would result from the use of the amortization procedures would not unduly burden ratepayers in their states.

9. Our staff reviewed Southern Bell's revised filings and determined that the proposed rates and amortizations were determined in accordance with both our annual update procedures and our depreciation methods. Inasmuch as our staff has found the rates and amortizations to be consistent with our procedures and rules and no comments have been submitted in opposition to these revised filings, we adopt their use.

B. Effective Dates

10. Southern Bell requested effective dates of September 1, 1985, for its Georgia jurisdiction and April 1, 1985, for its North Carolina jurisdiction. Inasmuch as no comments were filed in opposition to the requested effective dates, and the requested dates are within the provisions of Section 43.43(e) of our Rules, we grant the effective dates requested.

IV. ORDERING CLAUSE

11. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1,4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151,154(i), 201-205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation and Amortizations for SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY — GEORGIA

Effective September 1, 1985

ACCT. No. *A*	*Class or Subclass of Plant* *B*	*Average Remaining Life (years)* *C*	*Future Net Salvage (%)* *D*	*12/31/84 Book Reserve* (%)* *E*	*Remaining Life Rate (%)* *F*	*Annual AMORT Expense# ($000)* *G*	*First Year ELG* *H*
212	BUILDINGS	33.0	4	15.6	2.4	1263	-
221-37	COE — STEP-BY-STEP	1.7	-4	29.1	44.1	-	-
221-47	COE — CROSSBAR	3.0	-3	37.3	21.9	-	-
221-57	COE — CIRCUIT — OTHER	8.9	3	29.9	7.5	7578	1983
221-157	COE — CIRCUIT — DDS	7.8	-1	17.4	10.7	-224	1983
221-67	COE — RADIO	9.1	-5	31.3	8.1	-21	1983
221-77	COE — ELECTRONIC	14.0	4	18.3	5.6	11217	1983
231	STA APP — TELETYPEWRITER	6.7	0	31.9	10.2	-681	-
231	STA APP — TELE & MISC	5.6	0	40.9	10.6	-476	-
234	LARGE PBX — ELECTRONIC	6.0	5	23.6	11.9	-35	-
234	LARGE PBX — OTHER	3.0	-4	35.0	23.0	-	-
244	LARGE PBX — DDS	4.7	2	35.6	13.3	7	-
235	PUBLIC TELE EQUIPMENT	5.6	0	39.3	10.8	621	-
241	POLE LINES	15.1	-49	28.5	8.0	-385	1982
242.1	AERIAL CABLE —EXCH	12.7	-19	35.8	6.6	9150	1982
242.1	AERIAL CABLE — TOLL	9.5	22	26.2	5.5	83	1982
242.2	UNDERGROUND CABLE — EXCH	21.0	10	19.2	3.4	3069	1982
242.2	UNDERGROUND CABLE	11.1	29	14.0	5.1	-132	1982
242.3	BURIED CABLE —EXCH	17.5	-5	25.1	4.6	7035	1982
242.3	BURIED CABLE — TOLL	11.4	-3	38.6	5.6	333	1982
242.4	SUBMARINE CABLE	16.3	-3	16.9	5.3	-5	1982
243	AERIAL WIRE	7.7	-37	43.2	12.2	107	-
244	UNDERGROUND CONDUIT	56.0	-5	13.1	1.6	299	1982
261	FURNITURE & OFF EQPT	12.6	14	14.6	5.7	132	1983
261-03	COMPUTERS & AMA	3.6	0	49.1	14.1	-	1983
262	OTHER COMM EQPT	5.7	0	32.7	11.8	1687	-
264-01	MOTOR VEHICLES	3.8	22	40.1	10.0	-868	1983
264-01	TOOLS & O.W.E.	9.0	3	21.2	8.4	-246	1983
264-13	AIRCRAFT	7.5	60	10.0	4.0	11	-

* For accounts in which annual amortization expense figure are shown in Column (G), Column (E) contains the theoretical reserve percentage.

# Reflects amortization of the January 1, 1985 reserve imbalances over 3.5 years.

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation and Amortization Accounts for SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY – NORTH CAROLINA

Effective April 1, 1985

ACCT. No.	*Class or Subclass of Plant*	*Average Remaining Life (years)*	*Future Net Salvage (%)*	*12/31/84 Book Reserve* (%)*	*Remaining Life Rate (%)*	*Annual AMORT Expense# ($000)*	*First Year ELG*
A	*B*	*C*	*D*	*E*	*F*	*G*	*H*
212	BUILDINGS	33.0	3	16.6	2.4	-855	-
221-37	COE – STEP-BY-STEP	3.5	-4	60.3	12.5	4384	-
221-47	COE – CROSSBAR	4.0	-3	60.4	10.7	7307	-
221-57	COE – CIRCUIT –OTHER	8.4	-1	30.9	8.3	10364	1983
221-157	COE – CIRCUIT – DDS	7.8	1	14.4	10.8	-73	1983
221-67	COE – RADIO	8.0	-12	28.3	10.5	-79	1983
221-77	COE – ELECTRONIC	13.8	3	16.0	5.9	6186	1983
231	STA APP – TELETYPEWRITER	6.0	-1	40.2	10.1	-519	-
231	STA APP – TELE & MISC	7.5	1	32.7	8.8	-1645	-
234	LARGE PBX – ELECTRONIC	6.4	5	11.5	13.0	-1	-
234	LARGE PBX – OTHER	3.0	-4	41.6	20.8	-	-
244	LARGE PBX – DDS	4.8	2	24.2	15.4	6	-
235	PUBLIC TELE EQUIPMENT	7.7	1	31.2	8.8	957	-
241	POLE LINES	15.5	-41	32.5	7.0	-646	1982
242.1	AERIAL CABLE –EXCH	12.9	-11	35.9	5.8	7775	1982
242.1	AERIAL CABLE – TOLL	8.3	94	-6.7	1.5	-959	1982
242.2	UNDERGROUND CABLE – EXCH	21.0	9	22.0	3.3	1934	1982
242.2	UNDERGROUND CABLE	13.4	16	27.6	4.2	227	1982
242.3	BURIED CABLE –EXCH	17.6	-5	24.7	4.6	9185	1982
242.3	BURIED CABLE – TOLL	12.1	7	39.9	4.4	787	1982
242.4	SUBMARINE CABLE	17.0	-3	36.3	3.9	-8	1982
243	AERIAL WIRE	4.8	-38	67.2	14.8	546	-
244	UNDERGROUND CONDUIT	55.0	-5	14.8	1.6	198	1982
261	FURNITURE & OFF EQPT	15.3	2	12.5	5.6	92	1983
261-03	COMPUTERS & AMA	3.9	0	40.6	15.2	-599	1983
262	OTHER COMM EQPT	6.7	1	29.9	10.3	441	-
264-01	MOTOR VEHICLES	4.4	16	40.9	9.8	-257	1983
264-01	TOOLS & O.W.E.	9.5	15	22.2	6.6	470	1983
264-13	AIRCRAFT						

* For accounts in which annual amortization expense is shown in Column (G), Column (E) contains the theoretical reserve percentage.

Reflects amortization of the January 1, 1985 reserve imbalances over 3.0 years.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service denied. Proposal fails to meet requisite technical standards.
—*Systematics General Corp.*

FCC 85-421

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Applications of	
SYSTEMATICS GENERAL CORPORATION	File Nos. 974-DSS-P/LA-84 975-DDS-P/LA-84
For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. In the applications captioned above, Systematics General Corporation (SGC) is requesting authority to operate two domestic fixed-satellits in the 4/6 GHz bands. Public notice of the filing of these applications was given on March 12, 1984. Petitions to Deny these applications were filed by Ford Aerospace Satellite Services Corporation (Ford) GTE Satellite Corporation (GSAT) and GTE Spacenet Corporation (Spacenet); and COMSAT General Corporation (Comsat), Equatorial Communication Services (Equatorial), National Aeronautics and Space Administration (NASA) and Satellite Business Systems (SBS) filed comments on these applications.

2. The facilities which SGC proposes to operate were constructed as spacecraft operating in a Tracking and Data Relay Satellite System (TDRSS) to provide communications and data relay between low earth-orbiting spacecraft and ground mission control and data handling stations.

3. TDRSS is operated by Space Communications Company (Spacecom), and is operated as a government radio system to serve NASA in frequency bands allocated for government use.[1] Each satellite carries 12 transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 5.5 watts. Transmit frequencies are in the band 3700–4200 MHz and receive frequencies are in the band 5925–6425 MHz. Coverage will be provided of the eastern portion of the United States at a nominal EIRP level of 32 dBW. The orbital locations requested are 41° W. L. and 61° W. L. Services are proposed to be offered on a noncommon carrier basis.

4. Because of its arrangements with NASA, the main controversy surrounding SGC's application is related to its legal qualification as a tellite licensee. NASA has filed an endorsement of its application. The GTE Companies state that, in addition to revealing operational inefficiency, SGC's application is contrary to the policy against allowing private companies to provide nonmilitary satellite services to the government. Comsat General states that such services should be licensed as government stations. SBS attacks the provision of transponders for governmental services as anticompetitive. Ford objects to the application on grounds of technical inefficiency only if its grant will preclude the grant of other applications. In its general comments, Equatorial lists SGC as an applicant apparently not having sufficient customer need to be qualified.

5. In reply, SGC states that GSAT and GTE Spacenet's opposition fails to meet procedural requirements and that SGC is the real party in interest and meets the statutory and public interest requirements for a satellite applicant. To Ford, SGC

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[1] The construction of the commercial radio facilities on board the TDRSS satellites was initially authorized by the Commission in 1980 as the Advanced WESTAR system. *See Western Union Telegraph Company*, 86 FCC 2d 196 (1981). However, that authohrization became null and void as a result of the TDRSS contract reformation. *See Western Union Telegraph Company*, 94 FCC 2d 467 (1983), *recon. denied* by *Memorandum Opinion and Order*, FCC 85-391 (adopted July 25, 1985). No requests pursuant to Section 310(d) of the Communications Act were submitted for assignment of license or transfer of control in connection with the TDRSS contract reformation. As a result, the SGC proposal is being treated as a request for new radio station authorizations.

claims its satellites will operate as a Far Eastern Regional Network which will not preclude any other applicant. With respect to Equatorial's comments, SGC asserts that it is well qualified financially and, in fact, better qualified than Equatorial itself. SGC also asserts that although its 12 transponder satellite may be inefficient, because it is requesting a location which would otherwise not be used, grant of its application represents good orbit management. In addition, SGC replies to Comsat that its satellites should not be classified as government stations. SGC states that SBS's assertions are contradictory and irrelevant to the processing of SGC's application.

6. In *Reduced Orbital Spacing,*[2] the Commission adopted technical standards on minimum space station design capacity to achieve efficient use of the geostationary orbit and spectrum. With growing demand for the limited number of available orbital locations, the Commission determined that assigning orbital locations to satellites that did not achieve state-of-the-art capacity could preclude the operation of more efficient designs to the detriment of the public's ability to obtain a sufficient supply of transponder capacity.

7. The specific standard applicable to the satellites which SGC proposes to operate requires the satellite to carry the equivalent of 24 transponders each with a power of 8 watts and a bandwidth of 36 MHz. The satellites proposed by SGC carry only 12 transponders with 5.5 watts of power. There is no dispute that the facilities proposed by SGC do not satisfy this rule and that therefore the application may be dismissed.

8. The fact that the satellites have already been constructed is an insufficient justification for assigning one or more of the limited number of available orbital locations to these satellites when these locations might otherwise be used by state-of-the-art satellites. While there may be some merit to NASA's view that it would be a waste of an already paid-for facility not to grant SGC's request, NASA's decision on the choice of a spacecraft design for a joint government/commercial satellite system can not dictate how the Commission discharges its licensing functions in commercial satellite bands under the standards of the Communications Act. In this case, we find that public demand for increasing satellite capacity in the commercial 4/6 GHz bands requires that only state-of-the-art satellite designs be licensed in these bands. In this case, the need to maximize available in-orbit

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[2] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d 577 (P&F) (1983).

capacity outweighs any disadvantages to SGC or NASA in not assigning orbital locations or granting a license to operate these facilities.

9. We would not, however, be adverse to permitting the operation of these facilities until the orbital locations are in fact ready to be used by the operator to which they are assigned. Any such authorization would, of course, automatically terminate prior to the launch of the satellite to which the location was permanently assigned, and any operations by SGC would be subject to the condition that no unacceptable interference be caused to regularly licensed satellite facilities. We would therefore entertain the filing of a request for special temporary authorization pursuant to Section 309(f) of the Communications Act, 47 U.S.C. § 309(f), consistent with today's orbit assignment order[3] and other authorization actions.

10. As a result of our dismissal of SGC's applications, for non-compliance with the Commission's rules, we need not address the other matters raised by the parties in this proceeding.

11. Accordingly, IT IS ORDERED THAT applications, File No. 974/975-DDS-P/LA-84 of Systematics General Corporation ARE DENIED.

12. IT IS FURTHER ORDERED that the petitions to deny these applications filed by Ford Aerospace Satellite Services Cororation, GTE Satellite Corporation and GTE Spacenet Corporation ARE GRANTED to the extent set forth above and DISMISSED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[3] In the Matter of Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 85-396 (adopted July 25, 1985).

CATV Carriage, Significant Viewing Test
Review Application for

> Denied review of delegated decision denying significantly viewed status based on county-wide data. Station improvements insufficient to warrant treating station as "new," allowing it to use county-wide rather than community-specific data. Data submitted insufficient in any event.
> —*Taft TV and Radio Co., Inc.*

FCC 86-101

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re:

TAFT TELEVISION AND RADIO COMPANY, INC.	CSR-2731 CSR-2732
Application for Review	

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1986; Released: March 13, 1986

BY THE COMMISSION:

Introduction

1. On April 8, 1985, Taft Television and Radio Company, Inc. (hereinafter "WCIX"), licensee of Television Broadcast Station WCIX (Ind., Channel 6), Miami, Florida, filed an "Application for Review" of the decision of the Chief of the Video Services Division, Mass Media Bureau, in *Taft Television and Radio Company, Inc.*, Cable Television Actions Report No. 2953, Mimeo No. 3355 (released March 22, 1985). By that decision, the Division Chief denied WCIX's petitions to be declared significantly viewed in Broward County, Florida (CSR-2731) and in Palm Beach County, Florida (CSR-2732). WCIX's application is opposed by 39

Broadcasting, Ltd. (hereinafter "WDZL"), licensee of Television Broadcast Station WDZL (Ind., Channel 39), Miami, Florida; Malrite of Florida, Inc. (hereinafter "WFLX"), licensee of Television Broadcast Station WFLX (Ind., Channel 29), West Palm Beach, Florida; and by PEC Communications, Inc. (hereinafter "WPEC") licensee of Television Broadcast Station WPEC (ABC, Channel 12), West Palm Beach, Florida.[1]

2. In its initial petitions, WCIX sought to be permitted to utilize county-wide data for purposes of determining its significantly viewed status, pursuant to Section 76.54(d) of the Commission's Rules, because technical improvements made by WCIX since the Commission's original surveys in 1972 warrant treating WCIX as a "new" station. Absent the requested relief, because WCIX was operational in 1972 and was not found at that time to be significantly viewed, WCIX would today have to submit community-specific data. The technical improvements relied upon by WCIX were: (1) an increase in antenna height above average terrain (HAAT) from 990 feet to 1400 feet; (2) an increase in effective radiated power from 77.6 kw to 79.4 kw; (3) a change in WCIX's transmitting antenna polarization from horizontal to circular; and (4) an increase in the station's predicted Grade B contour coverage from 5,150 square miles to 5,874 square miles, an increase of 12.3%. In response to oppositions from WDZL, WFLX, WPEC, and Station WTVX (CBS, Channel 34), Ft. Pierce, Florida, WCIX expanded upon its initial showing, noting that the strength of the horizontal component of WCIX's signal increased by 6.0 dB and 6.5 dB on two radials (field strength increases of 400% to 450%). WCIX further noted that its predicted Grade A coverage of Broward County increased from 8.4% to 51.6%, and

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[1] WCIX also filed a reply pleading on May 30, 1985. WFLX on June 4, 1985, moved to dismiss WCIX's reply pleading as unauthorized, pursuant to Section 1.115(f) of the Commission's Rules. WCIX opposes this motion, claiming that Section 1.115(f) of the Rules applies only to hearing proceedings, and that WCIX's reply is authorized by Section 1.115(d) of the Rules. WFLX disputes WCIX's contention. We agree with WFLX. Section 1.115(f) of the Rules is a rule of general application, authorizing replies in proceedings on review only when requested by the Commission. Section 1.115(d) of the Rules is applicable only to authorized replies. WCIX's reply was not requested by the Commission, and also exceeds the page limitation prescribed by Section 1.115(f) of the Rules for authorized replies, and will be dismissed. *See e.g., WACCO, Inc.* (Wayne, West Virginia), 100 FCC 2d 1054, 1054 n.1 (1985); *KOIN-TV, Inc.* (Portland, Oregon), 93 FCC 2d 186, 186 n.1 (1983). We also note that, despite the decision in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D. C. Cir. 1985), *petition for cert. filed sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3229 (U. S. Sept. 23, 1985) (No. 85-502), these cases are not moot, because significantly viewed status affects questions of nonduplication protection and effective competition.

from a "negligible" percentage of population to 57.2%; in Palm Beach County, the Grade B increases were from 25.4% to 49.5% of land area, and from 11.7% to 35.6% of population. However, the Division Chief found that WCIX's technical improvements were not sufficient to warrant treating WCIX as a "new" station, and denied the petitions.[2]

Summary of Pleadings

3. In support of its application, WCIX contends that the Division Chief failed to consider "relevant and probative evidence," and relied mechanically on the factual pattern underlying *Calvert Telecommunications Corp. d/b/a CALTEC* (Lutherville-Timonium, Maryland), 63 FCC 2d 1022 (1977). WCIX maintains that "the vast improvement in WCIX's off-air reception in Broward and Palm Beach counties," was considered, particularly the increase in population and Grade A coverage, as well as the field strength of the WCIX signal. In addition, WCIX points to the importance of its change to circular polarization, which will improve reception to those homes utilizing "rabbit ear" antennae in the Broward-Palm Beach area.

4. In opposition to WCIX, WDZL argues that the Division Chief did consider all of WCIX's evidence, and properly found it wanting pursuant to *CALTEC, supra.* In that latter case, notes WDZL, the station in question had transformed itself from "a typical station in terms of its coverage potential [to] one of the most powerful UHF stations in the United States." *Id.* at 1026 (footnote omitted). Similarly, argues WDZL, the station in question in *Independent Broadcasting Company*, 54 RR 2d 712 (1983), had nearly tripled its antenna height and more than doubled its area of predicted Grade B coverage. In contrast, asserts WDZL, WCIX's improvements do not approach such magnitudes, and its petitions were properly denied.

5. WFLX contends that population coverage is not germane to technical improvements, nor is reception via "rabbit ear" antennae. WCIX's improvements, argues WFLX, were properly found

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[2] The viewing data submitted by WCIX showed the following audience levels:

	Total Viewing Hours	*Net Weekly Circulation*
Broward County	7%	52%
Palm Beach County	2%	19%

Pursuant to Section 76.5(k) of the Rules, in order to be declared significantly viewed, an independent television broadcast station must achieve a share of viewing hours of at least 2% (total week hours), and a net weekly circulation of at least 5%.

insufficient to warrant consideration as a "new" station. In any event, notes WFLX, as it argued below, the viewing data proffered by WCIX does not demonstrate significantly viewed status, as it impermissibly commingled viewing data attributable to Television Broadcast Translator Station W33AA (Channel 33), Miami, Florida, a 100-watt translator station which rebroadcast WCIX's signal until December 1, 1983, during the time that the Arbitron viewing measurements submitted were taken. Nor, asserts WFLX, does the 2% share of viewing hours reported for WCIX in Palm Beach County allow for standard error. In fact, notes WFLX, more recent Arbitron data shows that WCIX's share of viewing hours in Palm Beach County has slipped to 1%, and its net weekly circulation to 14%.

6. WPEC argues that the decision below was proper, and was clearly based on more than a mechanical application of language from *CALTEC, supra*. WPEC contends that WCIX has not shown that the Division Chief abused his authority or discretion. Indeed, notes WPEC, the engineering statement submitted by WCIX reveals that the station's own engineer discarded certain results because of low signal strength, which the engineer felt not to be indicative of the performance of the station, which would, maintains WPEC, inhibit reception even with "rabbit ear" antennae. Nor is WCIX's data sufficient in any event, due to the presence of W33AA during the survey period.

Discussion

7. We are not persuaded that the Division Chief erred in his determination in *Taft Television and Radio Company, Inc., supra*, that WCIX's technical improvements were not of sufficient magnitude to warrant treating WCIX as a "new" station for purposes of Section 76.54 of the Rules. Nor do we believe, as WCIX alleges, that the Division Chief failed to consider all relevant evidence. To the contrary, the decision below specifically references WCIX's power increase, its increase in antenna HAAT, and the change in antenna polarization, and found them wanting. While we stated in *CALTEC, supra*, "that we are not establishing in this case criteria determining what constitutes the necessary technical improvements to establish a 'new station,' " *id.* at 1026, we have consistently based such determinations upon more than minimal signal coverage increases and possibilities of improved reception. *E.g., Amaturo Group, Inc.*, Cable Television Actions Report No. 2968, Mimeo No. 4984 (released June 6, 1985) (satellite station became full independent station, increased Grade B

coverage by 49%); *Independent Broadcasting Company, supra* (Grade B coverage more than doubled); *CALTEC, supra* (radiated power increased nearly three-fold and Grade B coverage increased by approximately 41%). This is simply not the situation facing us today. WCIX increased its Grade B coverage by only 12.3%. The remaining improvements relied upon by WCIX merely suggest that an existing station has improved its possibility of local reception, not that it warrants treatment as a "new" station. In any event, even if county-wide data were acceptable, the audience viewing data submitted by WCIX cannot be relied upon to determine the station's significantly viewed status. The data impermissibly commingles viewing data from WCIX with viewing data from W33AA, a local translator station, and it is settled that determinations of significantly viewed status cannot be based upon such commingled data. *KOIN-TV, Inc., supra; Scranton Broadcasters, Inc. and WBRE-TV, Inc.*, 88 FCC 2d 1482 (1982).

8. In view of the foregoing, we find that grant of WCIX's application is not in the public interest.

9. Accordingly, IT IS ORDERED, That the motion to dismiss filed June 4, 1985, by Malrite of Flordia, Inc. IS GRANTED, and the consolidated reply filed May 30, 1985, by Taft Television and Radio Company, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED, That the "Application for Review" filed April 8, 1985, by Taft Television and Radio Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service denied based on applicant's failure to demonstrate requisite financial qualifications. —*U.S. Satellite Systems, Inc.*

FCC 85-422

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Applications of	
UNITED STATES SATELLITE SYSTEMS, INC.	File Nos. 976-DSS-LA-84 977-DSS-P/LA-84 978-DSS-P-84
For authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	

ORDER

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of United States Satellite System, Inc. (USSSI) requesting authority to launch and operate a third 12/14 GHz satellite previously authorized as an on-ground spare, to construct, launch and operate a fourth 12/14 GHz satellite and to construct a fifth such satellite to be used as an on-ground spare.[1] Petitions to deny

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[1] USSSI was authorized to construct three satellites and launch and operate two in the 12/14 GHz band. United States Satellite Systems, Inc., 94 FCC 2d 462 (1983). This authority was conditioned on USSSI's demonstration of its financial qualifications. The authorizations were declared null and void because USSSI failed to fulfill the required conditions. United States Satellite Systems,

were filed by American Satellite Company (ASC), GTE Satellite Corporation (GSAT), GTE Spacenet Corporation (GTE Spacenet) and Martin Marietta Communications Systems, Inc. (Martin Marietta). In addition, Martin Marietta filed a motion to dismiss and a supplemental motion to dismiss. Comments were filed by Satellite Business Systems (SBS). For the reasons set forth below, we deny USSSI's applications.[2]

2. USSSI is a corporation created for the purpose of constructing and operating a satellite system. USSSI estimates the cost of construction and launch of its system to be $217 million. USSSI's application states that the company expects to generate a positive cash flow from its first system in an amount sufficient to meet the first system's requirement and fund the proposed satellite system until 1990. It also expects to obtain a $250 million line of credit. The source of this anticipated debt financing was not disclosed. Finally, USSSI files with its instant application a letter from Manufacturers Hanover Trust Company (Manufacturers Hanover) in which Manufacturers Hanover states that it is prepared to work with USSSI to "assist" with the financial arrangements necessary for USSSI to fund its proposed system.[3]

3. The majority of petitions and comments raised issues regarding USSSI's financial qualifications. The commenters pointed out that USSSI had failed to support its first applications let along its second.[4]

Inc., Mimeo No. 2583 (released February 14, 1985). In a related action taken today, we deny USSSI's Application for Review, FCC 85-394 (adopted July 25, 1985).

[2] All applicants were provided with a final opportunity to amend their applications after the Commission issued a *Notice of Proposed Rulemaking* regarding the qualifications of Domestic Fixed-Satellite operators, FCC 85-238, CC Docket No. 85-135 (Released May 7, 1985). USSSI did not amend its application. Accordingly, we rely on the information in its November 7, 1983 application to determine its qualifications.

[3] In connection with the first USSSI applications, USSSI and Wang Laboratories entered into a stock purchase agreement, transponder purchase agreement and option agreement subject to Commission approval and subject to other conditions. The stock agreement, if consummated, would be worth $2 million to USSSI. Also, by letter agreement dated October 25, 1982, Manufacturers Hanover agreed to provide partial funding of the construction of the system by offering a $20 million line of credit to USSSI.

[4] These comments were filed before USSSI submitted its demonstration of financial qualifications. Also, several commenters raise other issues in opposition to USSSI's applications. For example, ASC claims that in light of its failure to fulfill its conditional authorization, USSSI should be treated a new entrant and thus its request for more than two positions is excessive. Martin Marietta points out that USSSI has requested already assigned orbital locations. Finally, ASC attacks the application for proposing late launch dates and for requesting contiguous positions. Our decision to deny USSSI's

4. We find that USSSI has not demonstrated the requisite financing to construct and operate its proposed satellite system pursuant to the Commission's rules.[5] USSSI relies on some unnamed institution offering it a $250 million line of credit. USSSI presents no evidence to support the contention that it has or soon will receive this debt financing. USSSI's statements alone cannot satisfy our financial requirements. USSSI relies on an arrangement with Manufacturers Hanover to provide financing. In its letter to USSSI dated October 31, 1983, Manufacturers Hanover stated that it was prepared merely to *assist* with the financial arrangements necessary to fund USSSI's system. No firm commitments were made to provide sufficient funding for either USSSI's first or present system. We find this type of financing arrangement insufficient to demonstrate financial qualifications. Section 25.391(d)(2)(iii) of our rules provides that financing arrangements contingent on further performance by either party will not be considered. The fact that Manufacturers Hanover merely agrees to assist with the financing arrangements of USSSI's venture provides us with no assurance that USSSI can, in fact, obtain primary financing.[6] Thus, we will not consider the October 31, 1983 letter and the attendant arrangement with Manufacturers Hanover as sufficient evidence of USSSI's financial capabilities.

5. Therefore, we conclude that USSSI has not satisfied our requirements to demonstrate that it has sources of financing currently available sufficient to construct, launch and operate its proposed system and its applications will be denied.[7]

6. Accordingly, IT IS ORDERED that the applications of United States Satellite Systems, Inc. to launch and operate a third 12/14 GHz satellite, to construct, launch and operate a fourth satellite and to construct a fifth satellite to be used as an on-ground spare, application File Nos. 976-DSS-LA-84, 977-DDS-P/LA-84, and 978-DDS-P-84 ARE DENIED.

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applications rests on its failure to demonstrate sufficient financial capabilities. Therefore, we need not address these other issues.

[5] These rules codify traditional Commission policy that requires all domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with construction, launch and operation of their proposed systems upon grant. *See* Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982); Report and Order in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985).

[6] *See Notice* at para. 22. Moreover, this financing does not even meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g.*, West Jersey Broadcasting, Co., 89 FCC 2d 478 (1978).

[7] U. S. v. Storer 351 U. S. 192 (1956).

7. IT IS FURTHER ORDERED that the Petition to Deny filed by American Satellite Company, GTE Satellite Corporation, GTE Spacenet Corporation and Martin Marietta Communications Systems, Inc. ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in the domestic fixed-satellite service granted as being consistent with Commission's rules and in furtherance of the public interest.
—*Western Union Telegraph Co.*

FCC 85-423

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of	
WESTERN UNION TELEGRAPH COMPANY	File Nos. 1831/1832 -DSS-P/LA-82; 2795/2796/2797-DSS-P/LA-82; 979/980/981/982/983/984/985/986/987/988/989/990-DSS-P/LA-84
For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service to Sell Transponders on a Noncommon Carrier Basis	

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 25, 1985; Released: August 29, 1985

BY THE COMMISSION:

1. The Commission is considering the above-captioned applications of Western Union Telegraph Company (Western Union) to

construct, launch and operate two 4/6 GHz domestic satellites[1] and two 12/14 GHz domestic satellites.[2] Western Union filed an amendment to its applications on June 7, 1985.[3] Petitions to Deny were filed by Martin Marietta Communications Systems, Inc. (Martin Marietta) and Ford Aerospace Satellite Services Corporation (Ford). Comments were filed by American Satellite Company (ASC), Satellite Business Systems (SBS), National Exchange, Inc. (NEX) and Federal Express Corporation (Federal Express). For the reasons discussed below, we grant Western Union authority to construct and launch two satellites of its choosing. Western Union's two remaining applications will be dismissed for failure to make the required financial showing.

2. Western Union currently operates a domestic satellite system known as "Westar" in the 4/6 GHz frequency bands. This system now consists of four in-orbit satellites.[4] The Westar II and III satellites each contain 12 transponders of 36 MHz and the Westar IV and V satellites each contain 24 transponders of 36 MHz.[5]

3. Western Union's proposed 4/6 GHz satellites are designed to carry 24 transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 10.4 watts. Coverage will be provided to the contiguous 48 states, Alaska and Puerto Rico/U.S.

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[1] Western Union requests one new 4/6 GHz orbital location which, with its existing locations, will give it a total of five 4/6 GHz locations. The other proposed 4/6 GHz satellite is a replacement satellite.

[2] Western Union requests two new 12/14 GHz orbital locations. It has no other 12/14 GHz satellite authorizations. In its June 7, 1985 amendment, Western Union has requested to withdraw all other remaining above-referenced 4/6 GHz and 12/14 GHz applications.

[3] All applicants were provided with an opportunity to amend their applications after the Commission issued a *Notice of Proposed Rulemaking* regarding the qualifications of domestic Fixed-Satellite operators. FCC 85-238, CC Docket No. 85-135 (released May 7, 1985). To the extent that any of the comments on this supplemental information have been rendered moot by the adoption of the final rules, they will not be discussed here.

[4] *See* Western Union Telegraph Company, 38 FCC 2d 1197 (1973); 46 FCC 2d 162 (1974); 47 FCC 2d 274 (1974); 54 FCC 2d 976 (1975), FCC 79-444 (released July 24, 1979), and 86 FCC 2d 196 (1981). *See also*, Domestic Fixed-Satellite Service: Assignment of Orbital Locations, 94 FCC 2d 129 (1983).

[5] In addition, Western Union was authorized to launch and operate Westar VI, 94 FCC 2d 467 (1983). This authorization became null and void when that satellite failed to achieve proper orbit after launch in February, 1984. Western Union has constructed a seventh satellite pursuant to a Section 319(d) waiver. *See* letter from Chief, Common Carrier Bureau to Robert N. Green (December 18, 1984). This satellite is to be used as an emergency replacement for Westar VI, now designated by Western Union as Westar VI-S, but originally applied for as Westar-7.

Virgin Islands by all 24 transponders. Twelve of the transponders also will provide coverage of Hawaii. Western Union requests authority to sell up to ten transponders on each 4/6 GHz satellite on a noncommon carrier basis; services on the remaining transponders are proposed to be offered on a common carrier basis.

4. Western Union's proposed 12/14 GHz satellites are designed to carry 16 transponders, each with a bandwidth of 54 MHz and a nominal transmitter output power of 45 watts. Each of the transponders will be switchable among full contiguous states coverage, or eastern or western regional coverages. In addition, 4 transponders can provide Alaskan coverage and 4 transponders can provide Hawaiian coverage. Western Union requests authority to sell up to 6 transponders on each 12/14 GHz satellite on a noncommon carrier basis; services over the remaining transponders are proposed to be offered on a common carrier basis.

5. Western Union estimates the total cost to construct and launch its proposed 4/6 GHz and 12/14 GHz satellites as $502 million, broken down by satellite as follows:

Requested Satellites	*Investment cost*	First Year *Operation*	*Total*
4/6 GHz Band			
Westar 8	99.5	2.2	101.7
Westar 9 (replacement)	99.5	2.2	101.7
12/14 GHz Band			
Westar A	154.5	3.8	158.3
Westar B	137.7	2.6	140.3
Totals	491.2	10.8	502.0

In amendments to its applications, Western Union states that while it believes it passes all reasonable financial tests on the basis of the material contained therein, the Commission should, if it determines that Western Union is deficient in any respect, grant a waiver based on Western Union's proven ability over the years to secure financing for its satellite program.

6. Ford, NEX and Federal Express contend that Western Union has not established its financial qualifications. They argue that the documentation provided by Western Union indicates that it does not have sufficient current assets or debt financing to construct and launch its proposed satellites. American Satellite Company (ASC) raised three objections to Western Union's applications. First, according to ASC, most of its proposed launch

dates are after January 1, 1988. Second, the Commission should not grant requests for replacements for satellites not yet authorized, and, third, the Commission should not grant requests by Western Union for contiguous orbital positions.[6] Martin Marietta has objected to Western Union's requests for specific orbital locations that were previously assigned in the 1983 orbit assignment order. Finally, SBS objects to Western Union's request for 91° W. L., currently assigned to SBS-4, and urges the Commission not to assign 93° W. L. to Western Union. Further, SBS requests that any grant to Western Union be conditioned on the resolution of potential interference problems which it believes are apparent from Western Union's application.

7. Careful review of the Western Union submissions indicates that it does not completely satisfy our rules governing the financial qualifications of domestic fixed-satellite operators.[7] Western Union is able to demonstrate $301 million in current assets and operating income,[8] while its estimated construction and launch costs are $502 million. This amount is only enough to finance its 4/6 GHz satellites or its 12/14 GHz satellites, but not both.[9] Thus we find that Western Union has demonstrated its financial ability to construct and launch only two satellites. We will not, however, make a determination as to which two should be authorized pursuant to Western Union's showing of financial qualifications under Section 25.391 of our rules. Instead we will allow Western Union to choose which of its proposed satellites it will construct and launch provided that the total cost does not exceed $301 million.

8. Additionally we conclude that Western Union's proposed launch dates for its remaining requested satellites do not exceed, as ASC argued, reasonable industry practice and find no reason based on these launch dates to defer action on them. Other issues raised by the parties with respect to orbital assignments are

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[6] We note that ASC's second objection is moot in light of Western Union's subsequent withdrawal of all but one application for a replacement satellite.

[7] *See Report and Order* in CC Docket No. 85-135, FCC 85-395 (adopted July 25, 1985). These rules codify traditional Commission policy that requires domestic satellite applicants to demonstrate that they are financially qualified to proceed immediately with construction, launch and operation of their proposed systems upon grant. Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983).

[8] While Western Union stated it had an established line of credit, it also appears that it has fully drawn down this established line of credit.

[9] The total cost for its two proposed 4/6 GHz satellites is $203.4 million, while its two proposed 12/14 GHz satellites would cost $298.6 million. The total cost of one of its proposed 4/6 GHz satellites and one of its proposed 12/14 GHz satellites would also be less than $301 million.

resolved in the *1985 Assignment Order*, FCC 85-396, adopted today. Moreover, based on Western Union's representations, we find that its proposed transponder sales are noncommon carrier in nature and are otherwise consistant with the *Transponder Sales Order*.[10] Thus, Western Union may sell the requested number of transponders on whichever satellites it elects to construct.

9. Finally, we will deny Western Union's request for a waiver of our rules as they pertain to its remaining two applications. We reject Western Union's claim that it should be granted a waiver based only on its past ability to secure financing for its currently authorized satellites. No other rationale was offered for its waiver request, and Western Union's simple assertion of financial ability does not warrant a waiver of our rules in this regard. In our *Report and Order* in CC Docket No. 85-135 (adopted July 25, 1985), we found that requiring existing companies to demonstrate compliance with the financial qualification rules, as adopted, would ensure that a licensee remains qualified to expand its system promptly upon grant of the requisite Commission authorizations.[11] We found no basis for distinguishing between new entrants and established carriers in making demonstrations of financial qualifications on the basis of documentation submitted in their applications. Thus, on the basis of the information submitted by Western Union, we conclude that it has not adequately demonstrated that it has satisfied our rules and policies regarding financial qualifications for two of its four applications and we will therefore dismiss two of its applications for this reason.

10. Accordingly, IT IS ORDERED that two of Western Union Telegraph Company's four applications ARE GRANTED and that Western Union Telegraph Company, after informing the Commission within 30 days of the release of this order which two satellites it will construct, IS AUTHORIZED to construct two domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications.

11. IT IS FURTHER ORDERED that Western Union Telegraph Company IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accord-

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[10] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D. C. Cir. 1984). With the sale of these transponders and the others approved today, a total of 24.7% of all authorized transponders will be available on a noncommon carrier basis. This is not significantly different from 21.7% of the then authorized transponders we considered in the *Transponder Sales Order*.

[11] *See Report and Order, supra* note 7 at para. 11.

ance with the *1985 Assignment Order*, FCC 85-396 (adopted July 25, 1985).

12. IT IS FURTHER ORDERED that the Western Union Telegraph Company SHALL COMPLY with the requirements of the *1985 Orbit Assignment Order*, FCC 85-396 (adopted July 25, 1985), as well as the terms and conditions of all other previous orders and authorizations.

13. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of these authorizations, and no later than the following dates for the space station facilities selected for construction and launch by Western Union.

	Construction Commenced	Construction Completed	Launch no later than
Westar VIII	August, 1986	November, 1988	January, 1989
Westar IX	April, 1987	October, 1989 January, 1990	
Westar A	October, 1986	January, 1989	March, 1989
Westar B	October, 1987	January, 1990	March, 1990

14. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to the Western Union Telegraph Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 85-395, in CC Docket No. 85-135, or *1985 Orbit Assignment Order*, FCC 85-396. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

15. IT IS FURTHER ORDERED that the Western Union Telegraph Company IS AUTHORIZED either to sell up to 10 transponders on each of its 4/6 GHz satellites or up to 6 transponders on each of its 12/14 GHz satellites, depending upon which satellites it chooses to construct, in accordance with

Commission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982); *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D. C. Cir. 1984).

16. IT IS FURTHER ORDERED that Application File Nos. 1832/2797-DSS-P/LA-82 and 979/980/981/983/984/985/986/986/988/989/990-DSS-P/LA-84 ARE DISMISSED at applicant's request.

17. IT IS FURTHER ORDERED that the Petitions to Deny of Ford Aerospace Satellite Services Corporation and Martin Marietta Communications Systems, Inc. ARE GRANTED to the extent set forth above and DISMISSED in all other respects.

18. IT IS FURTHER ORDERED that the Western Union Telegraph Company's request for a waiver Section 25.391(a), (b) and (c) of our rules IS DISMISSED.

19. IT IS FURTHER ORDERED that the other two authorizations requested by Western Union Telegraph Company which are not selected pursuant to paragraph 10 above ARE DENIED.

20. The Western Union Telegraph Company is afforded thirty days from the date of release of our *Report and Order, supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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